IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1855

PAUL W. MILHOUSE and EWING T. WAYLAND, Being Those Persons upon Whom Service of Process Was Attempted on Behalf of THE UNITED METHODIST CHURCH, a Named Defendant in the Underlying Action,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent.

and

CHARLES W. TRIGG, et al.,

Real Parties in Interest

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALBERT E. JENNER, JR.
KEITH F. BODE
EUGENE R. WEDOFF

JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

SAMUEL W. WITWER, SR.
SAMUEL W. WITWER, JR.

WITWER, MORAN, BURLAGE & ATKINSON
125 S. Wacker Drive
Chicago, IL 60606
(312) 332-6000

ALLAN J. RENICHE
DANIEL R. SALAS
WILLIAM F. FAHEY

SULLIVAN, JONES & ARCHER
1400 Financial Square
600 'B' Street
San Diego, CA 92101
(714) 236-1611

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners, Paul W. Milhouse and Ewing T. Wayland, being the persons upon whom service of process was attempted in the name of The United Methodist Church, a named defendant in the underlying action, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on May 13, 1979, denying their Petition for Writ of Mandamus.

OPINIONS BELOW

The judgment of the United States Court of Appeals, set forth in an unpublished order, is reproduced as Appendix A to this Petition. The order of United States District Court for the Southern District of California (entered August 23, 1978), for which review by mandamus was sought, is reproduced as Appendix B. The District Court rendered an oral opinion on the matters involved herein on August 15, 1978, and the transcript of the oral opinion is reproduced as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 1979. This petition was filed within 90 days of that date. This Court has jurisdiction to review the judgment by Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

This case presents what appears to be the first attempt to bring a suit for damages against an entire international religious denomination as an "unincorporated association" under Rule 17(b) of the Federal Rules of Civil Procedure. The questions presented are:

1. Can Rule 17(b) of the Federal Rules of Civil Procedure be applied, consistent with the Constitutional guaranty of due process, to make amenable to a suit for damages an international religious denomination which, as a totality, (a) has no officers, executive board, or other decision-making mechanism, so that there is no person or body able to consult with counsel or otherwise speak for the denomination in the course of the litigation and (b) holds no assets of any kind, so that a judgment against the denomination

could only be recovered from the assets of separate jural entities bearing the denominational name?

2. Can Rule 17(b) of the Federal Rules of Civil Procedure be applied, consistent with the Constitutional guaranty of free exercise of religion, to require a religious denomination to appear, answer, respond to discovery and otherwise participate collectively, as a single legal entity, in a suit for damages even though, under the ecclesiastical law and chosen polity of the denomination, the denomination is decentralized and non-authoritarian, there are no denominational funds or executive officers, and the separate entities and individual persons affiliated with the denomination are prohibited from binding one another or speaking for the entire denomination?

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

This case involves the interpretation of the following provisions:

1. The Fifth Amendment to the United States Constitution, which provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law. . . ."

2. The First Amendment to the United States Constitution, which provides in pertinent part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

3. Rule 17(b) of the Federal Rules of Civil Procedure, which provides in pertinent part:

> *"Capacity to Sue or be Sued.* The capacity of an individual, other than one acting in a representative capac-

ity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States. . . ."

RELATED MATTERS COMING TO THIS COURT

The essential issues raised in this petition will also be raised with finality in the context of a state court proceeding, in a forthcoming petition for Writ of Certiorari to be filed by June 30, 1979 in *Barr, et al.* v. *United Methodist Church, et al.*, California Court of Appeal, Cause No. 4th Civ. 18244. There, the United Methodist Church is confronted with a default of up to $366 million if it fails to answer and conduct litigation as a single party defendant. We respectfully request that the instant petition and the petition shortly to be filed in *Barr* be considered for consolidated review by this Court.

STATEMENT OF THE CASE

The petition for mandamus. The mandamus proceeding for which this Court's review is sought arose out of a $5 million action for common law fraud and violations of the federal securities laws, *Charles W. Trigg, et al.* v. *Pacific Methodist Investment Fund, et al.*, No. 78-0198-S (S.D. Cal., filed March 27, 1978). The complaint in *Trigg* involves a bond issue made by Pacific Methodist Investment Fund ("the Fund"), a California non-profit corporation. The Fund was established, in order to raise money for a group of homes for the aged, by the Pacific and Southwest Annual Conference of The United Methodist Church, also a California non-profit corporation; it has no connection with any other unit affiliated with the United Methodist Church. Plaintiffs are holders of the Fund's bonds, which are now in default. Seeking to represent the class of all bondholders, the plaintiffs allege a series of misstatements and omissions in connection with the issuance of the bonds.

There are numerous defendants in the *Trigg* case. Plaintiffs have named the Fund, of course, and the Pacific and Southwest Annual Conference which established it. They also named an investment company employed by the Fund, and fourteen individuals who allegedly performed services in issuing the Fund's bonds. Another defendant is the General Council on Finance and Administration of the United Methodist Church ("GCFA"), an Illinois non-profit corporation which transmits certain voluntary contributions made by members of local United Methodist churches. The remaining defendant named in the complaint is the United Methodist Church ("the denomination"), alleged to be "an unincorporated association consisting of numerous persons, associations and corporations, which were and are organized and doing business as conferences, boards, commissions, councils and agencies. . . ." First Amended Complaint at

paragraph 3(d). In fact, as detailed below, the denomination is composed of over 45,000 largely independent units, and 10 million individual members, without a common head, managing board, headquarters, or joint assets.

The complaint also alleges that the denomination conspired with the other defendants, that it employed the other defendants as agents, and that it was a "control person" within the meaning of the federal securities laws in respect to the Fund. First Amended Complaint at paragraph 3(c). In an attempt to obtain personal jurisdiction over the denomination, plaintiffs served the present petitioners, Paul W. Milhouse, a former president of the denomination's Council of Bishops, and Dr. Ewing T. Wayland, the General Secretary and Treasurer of the defendant GCFA. Plaintiffs have pointed to no provision of church law giving these individuals any special authority to accept service of process or to speak or act for the entire denomination.

Bishop Milhouse and Dr. Wayland moved to dismiss the complaint, as against the denomination, for want of personal jurisdiction, (1) because the denomination does not have any quasi-corporate structure or centralized administration which would render it an "unincorporated association" amenable to suit under Rule 17(b) of the Federal Rules of Civil Procedure, (2) because no one, under the ecclesiastical law of United Methodism, is authorized to answer the complaint or otherwise speak for the entire denomination, and (3) because they personally had no authority to receive service of process for the entire denomination. The petitioners did not argue for any form of "religious immunity," but rather pointed out that any or all of the separate units composing United Methodism are amenable to suit.

In support of their motion petitioners filed the affidavits of several experts within the United Methodist Church,

explaining the non-authoritarian decentralized structure of the denomination. Plaintiffs responded with an affidavit and chart prepared by their attorney, presenting his personal interpretation (a) of the ecclesiastical law and polity of the denomination and (b) of several documents concerning individual units of the denomination. The plaintiffs offered no expert testimony of any kind to refute the statements made by petitioners' authorities in support of the motion to dismiss.

On August 15, 1978, after considering the materials submitted by the parties and the arguments of counsel, the district court announced in an oral opinion that it would deny petitioners' motion to dismiss. (See Appendix C hereto.) The district court appeared to base its decision primarily on its own reading of church law. Eight days later the court issued a written order denying the motion. (Appendix B hereto.) Petitioners made two separate requests for certification of the question for interlocutory appeal; each was denied. Thereafter, on September 11, 1978, petitioners filed a request for a stay from the Ninth Circuit Court of Appeals, pending their filing of a petition for writ of mandamus. The court of appeals denied the motion on September 14. Because the denomination had not answered at this time, the plaintiffs sought and obtained a default order in the district court against it. That default order against the denomination is presently in effect; the other named defendants, including the specifically named church units, have answered and intend to pursue the litigation on the merits.

On November 2, 1978, Bishop Milhouse and Dr. Wayland filed their petition for writ of mandamus with the court of appeals, urging that the district court be required to grant their motion for dismissal of the denomination as a party defendant. The court of appeals denied the petition on

March 13, 1979, in a one-paragraph order. (Appendix A hereto.)

Suable entities comprising the denomination. As noted in the affidavits which petitioners submitted in support of their motion to dismiss, the ecclesiastical law of the United Methodist Church is officially stated in *The Book of Discipline of the United Methodist Church* (1976), the highest constitutional and legislative pronouncement of the denomination. Affidavit of Dr. Murray H. Lieffer (May 8, 1978), App. Ex. 1, ¶ 5; Affidavit No. 1 of Ewing T. Wayland (May 5, 1978), App. Ex. 2, ¶ 4; Affidavit of Paul Milhouse (May 3, 1978), App. Ex. 4, ¶ 3.[1] The denomination as a whole has never been incorporated. As detailed by *The Book of Discipline,* and explained in the affidavits, the denomination is an aggregation of many largely independent entities held together in what is called "a connectional structure." See *The Book of Discipline,* at 231. There are basically four types of entities within the denomination, defined by the geographical scope of their ministry.

1. First, are the local churches, defined and described in *The Book of Discipline* at ¶¶ 201-271. There are approximately 39,000 local churches affiliated with the United Methodist Church in the United States, and another 4,000 outside this country. Leiffer affidavit, App. Ex. 1, ¶ 10. Each local church is responsible for its own property and its own financial and operating affairs. *Id.* The affairs of each local church are administered by an Administrative Board acting as an executive agency. *The Book of Discipline,* ¶¶ 247-250. No local church has been named as a defendant in the *Trigg* case.

[1] "App. Ex." refers to the exhibits contained in the combined Appendix of Affidavits and Exhibits filed by petitioners with the district court in support of their motion to dismiss.

2. Operating in a broader geographical area, there are other church entities known as "annual conferences." *The Book of Discipline,* ¶¶ 700-751. This term refers to a meeting of clergy and laymen from many local churches in an area, and also refers to the area from which they come. There are 73 annual conferences within the United States and 41 outside. Leiffer affidavit, App. Ex. 1, ¶ 10. The members of the annual conferences regularly meet once a year to review matters of common concern, and to develop and support benevolent programs within their boundaries. *Id.,* ¶ 13. An example of such programs is provided by the retirement homes involved in the present litigation; these are ministries related to the Pacific and Southwest Annual Conference. The funds necessary for such annual conference programs are sought directly or indirectly from the local churches, *The Book of Discipline,* ¶ 711, but an annual conference has no power to bind financially the denomination or any church unit associated with the denomination, other than itself, *id.,* ¶ 702(2).[2]

The annual conferences may meet more than one a year (*id.,* ¶ 701(4)); they may incorporate (*id.,* ¶ 701(1)); they each have a treasury and a treasurer (*id.,* ¶¶ 717-718). No argument has been raised in this lawsuit about the jural status of the annual conferences or any other constituent units of the denomination. In the *Trigg* case, only one annual conference has been named as a defendant, the Pacific and Southwest Annual Conference, a California non-profit corporation. It has appeared and answered.

3. Next, in order of increasing geographical scope, are fourteen "jurisdictional" and "central" conferences. *The Book of Discipline,* ¶¶ 620-652; Leiffer affidavit, App. Ex.

[2] United Methodists have not viewed their relationships, inter se, as including any agency or permission to bind each other to legal obligation. Leiffer affidavit, App. Ex. 1, ¶ 27.

1, ¶ 21. One of their principal functions is the election of bishops. Id., ¶ 22. The bishops of the denomination ordain and appoint ministers to the local churches, *The Book of Discipline,* ¶¶ 514-515, and preside, without voting, over annual conferences, whose direction the bishops must follow. Leiffer affidavit, App. Ex. 1, ¶ 22. The bishops of the denomination, active and retired, compose the Council of Bishops. *The Book of Discipline,* ¶ 525. This body is essentially a consultative group; it has no power to speak for or control the denomination or to commit any entity within the denomination to action. Leiffer affidavit, App. Ex. 1, ¶ 22; Milhouse Affidavit, App. Ex. 4, ¶ 6. Neither the Council of Bishops nor any of the jurisdictional or central conferences has been named as a defendant in *Trigg.*

4. The national and global operations of the United Methodist denomination are the concern of the remaining denominational entities—the General Conference and general boards. *The Book of Discipline,* ¶¶ 601-612. Every four years, delegates elected by the annual conferences assemble to form the General Conference, which serves as a legislative assembly. Leiffer affidavit, App. Ex. 1, ¶ 18. *The Book of Discipline* is the body of law enacted by the General Conference.[3] Only the General Conference can speak for the Church as a whole. *The Book of Discipline,* ¶ 612(1). The General Conferences have established various boards and councils to carry out the work of the Church on a world-wide basis. There are presently 13 such "general" boards. Leiffer affidavit, App. Ex. 1, ¶ 20. All of these boards, and most of their subsidiary units, are incorporated. *Id.* However, the General Conference itself is not a continuing body. It meets quadrennially for approximately two weeks and

[3] The highest judicatory of the denomination, charged with interpretation of *The Book of Discipline,* is the Judicial Council. *The Book of Discipline,* ¶¶ 60-63.

then adjourns, *sine die.* It has no offices, and no permanent staff. *Id.,* ¶ 18.

The boards and councils established by the General Conference to perform the Church's world-wide ministry receive their funds from the 10 million individual members of the Church, through the local churches and annual conferences. About 94½% of the amounts donated by members of the denomination remain at the local level, for use by the local churches and annual conferences; the remaining 5½%, contributed for world ministries, transmitted through the General Council on Finance and Administration, is known as "general funds." Wayland affidavit No. 1, App. Ex. 2, ¶ 7. These funds are routed to the General Council on Finance and Administration ("GCFA"), one of the 13 general level boards and an Illinois non-profit corporation. GCFA then acts as conduit to distribute these funds, in the manner specifically budgeted and directed by the General Conference. In this activity it is on occasion referred to as rendering "central treasury" services, but it is not the treasury or treasurer of the entire denomination. Wayland Affidavit No. 1, App. Ex. 3, ¶ 4. In carrying out certain of its functions, GCFA sometimes works with a second board, the General Council on Ministries, which is charged with reviewing the Church's ministries. *The Book of Discipline,* ¶ 1001-1005. There is no question in this case about the jural, suable status of the general level boards. GCFA is the only such board named as a defendant in *Trigg.* It has appeared and answered.[4]

[4] GCFA contested the "long arm" jurisdiction of a California court in a related case, *Barr, et al.* v. *The United Methodist Church, et al.,* No. 404611 (Superior Ct., San Diego County) Cause No. 78-300 in this Court, *cert. denied.,* ____ U.S. ____, 99 S.Ct. 281, (1978), but has never asserted that it was not a jural entity, nor did it raise in that case the issues presented here.

The church units listed above are interrelated and interconnected by a common faith and tradition, and by common representation at various conferences. However, they operate with a high degree of independence. There is no chain of command linking these units nor are the levels described above layered vertically in any ascending order of authority. Indeed, the basic constitutional units in the denomination are the 114 annual conferences, and no substantial changes in the organization and constitution of the denomination can be adopted without the concurrence of these conferences. *The Book of Discipline,* ¶¶ 37, 64. In the use of their funds, the separate annual conferences are not subject to the control of other denominational bodies. Leiffer affidavit, App. Ex. 1, ¶ 13; Wayland affidavit No. 1, App. Ex. 2, ¶ 11. Likewise, the general level boards are not subject to the control of any single person or council, but seek to carry out the programs of the General Conference in largely independent fashion. *Id.,* ¶ 20; Wayland affidavit No. 1, App. Ex. 2, ¶ 4.

There is no chief executive person or body to whom the separate entities within the United Methodist denomination are answerable. This and other decentralized characteristics of the denominations are noted by Bishop Tuell in his text, *The Organization of The United Methodist Church* (rev. ed. 1977) at 127-129:

> "If someone had a complaint, and wanted to go to the head of the United Methodist Church with it, that head person would be hard to find. One might try the president of the Council of Bishops, but would discover that this person is primarily a presiding officer over the semi-annual meetings of the Council of Bishops. The president has no particular authority in the church at large not possessed by all other bishops . . .

> "One might try the general secretary of the General Council on Ministries, but would discover that this person, though head of an agency involved in coordinating the total work of the program agencies of the church, is by no means in charge of the total work of The United Methodist Church. If our complainant went to see the executive head of one of our boards or agencies, he or she would be told that that person has charge of only a certain portion of the work of the church. One might approach the presiding bishop of a session of the General Conference, but would be told that anywhere from fifteen to twenty-five bishops may share in the task of presiding at any quadrennial meeting of the General Conference. If one were to go to the president of the Judicial Council, he or she would be told, 'All we do is decide cases.'
>
> • • •
>
> "This is simply to illustrate the fact that power and authority are widely dispersed within The United Methodist Church, undoubtedly deliberately so. We have inherited from the founders of America a rather keen distrust of too much power centralized in one person. There is not only not a head person, there are no headquarters of our church. This is not necessarily bad, but we should recognize that this general lack of central direction over the years has resulted in our various boards and agencies pretty much going their own independent ways, each developing its own programs which sometimes overlapped with programs of our other agencies and sometimes actually conflicted. . . ."

Except for the quadrennial General Conference, there is no person or group who can speak for or commit the entire denomination to action. The affidavit of Ewing Wayland demonstrates, without contradiction by the plaintiffs below, that the United Methodist Church, in its denominational

entirety and as distinguished from its affiliated organizations, has never:

(1) employed any person or held any employer identification number;

(2) held any bank account;

(3) issued any check, note or draft;

(4) held legal title to any property, real or personal;

(5) except for "covenants" of religious cooperation and comity with other religious groups, entered into any contract;

(6) filed a tax return;

(7) maintained a denominational headquarters; or

(8) established any officers for the entire denomination, and specifically, has never had a chief executive or other head person.

App. Ex. 2, ¶ 2.

The plaintiffs in *Trigg* have never specifically shown who they believe controls or can speak for the entire denomination. They have indicated that they would seek to enforce any judgment they obtain against the entire denomination by levying against all gifts of "general funds" made by local church numbers for the support of national and global ministries of the Church, regardless of what unit at a particular time is in possession of such funds.[5] Thus the possible targets for levy would include United Methodist local churches, the annual conferences, the General Council on Finance and Administration acting as conduit, its twelve sister general boards and any of the hundreds of denominational units for whose religious and charitable ministries the funds are given in the first instance.

[5] Answer to Petition for Hearing, *Frank T. Barr et al.* v. *The United Methodist Church, et al.*, 4th Civ. No. 18244 (Supreme Court of California, 1979) at 43 n. 25.

REASONS FOR GRANTING THE WRIT

As a matter of convenience a rule of law has been developed permitting associations which are unincorporated but otherwise possess the characteristics of corporations to be sued in their common names as "unincorporated associations." Rule 17(b), Fed.R.Civ.P. This Court has never defined the minimum requirements necessary to subject an aggregation of individuals to suit as an "unincorporated association." Yet the consequences of this sort of treatment for the individuals or other units alleged to make up the "association" are severe. These consequences include a requirement (a) to defend in a distant forum with which such individuals or units may have no contacts; (b) the necessity of conducting the defense as though the asserted "unincorporated association" were a unified entity even though the alleged associates never provided for or recognized the existence of any such overarching entity; (c) an obligation to produce multitudinous documents or witnesses and to answer interrogatories as an assumed totality without ability to gather the required information or to enforce compliance with discovery demands by other "members" of the asserted "association" and (d) exposure to liability for damages collectible from whatever might be determined in subsequent legal proceeding to constitute "common assets" of the "association" subject to levy and other judgment satisfaction procedures.

Respondents have put forward the definition that any aggregation of individuals promoting *a common objective* under *a common name* is an "unincorporated association." By this loose definition the Christian Church, the peace movement and the "federal judiciary" would seemingly with equal ease be held to constitute an "unincorporated association." By the simple expedient of putting a general name on the caption of a complaint, filed perhaps in Alaska or

any remote forum, all Christians, war protestors or federal judges could be required to defend in that forum, assume obligations of complying with broad discovery demands, and run the risk of a large money judgment against "common assets." No one would know until the ramified litigation was concluded whether the funds of the Catholic Archbishop of Chicago, Connecticut Veterans Against the Vietnam War, or a club composed of federal judges sitting in the federal courts in New York City would be subject to seizure as "common assets" of the alleged unincorporated association.

In the case at bar a loosely structured "connectional" religious denomination, consisting of over 45,000 individual local churches and other related institutions and collectively possessing no common assets, has been subjected to suit as an "unincorporated association."[6] The suit, if allowed to proceed, seriously jeopardizes the chosen polity of the denomination.

Thus a rule which began as a matter of procedural convenience can become an instrument of injustice if carried to the present extremes. This Court should grant certiorari to clarify the outer parameters and procedural consequences of suits against unincorporated associations in the context

[6] In the history of Anglo-American jurisprudence prior to the web of Pacific Homes litigation targeted against the United Methodist Church, no major international religious denomination, including United Methodism, other world-wide Protestant faiths, the Roman Catholic Church and the Jewish congregations has been held subject to suit as a legal entity as distinguished from one or more of its jural local churches, diocesan councils, or sub-units, answerable in damages for the acts or omissions of a local unit or affiliated institution.

of major religious systems, rejecting the expansive definition of Rule 17(b) adopted by the district court.

I. RULE 17(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE CANNOT, CONSISTENT WITH DUE PROCESS, BE INTERPRETED TO ALLOW AN ACTION FOR DAMAGES TO BE BROUGHT AGAINST AN AGGREGATION OF PERSONS AND ENTITIES WHO HOLD NO COMMON ASSETS, AND WHO HAVE NO CENTRALIZED MANAGEMENT.

In *United Mine Workers* v. *Coronado Coal Co.*, 259 U.S. 344 (1922), this Court changed the laws regarding the capacity of unincorporated associations to be sued, at least on federal claims. Prior to this decision, the general rule had been that "an unincorporated association of persons . . . could only sue or be sued in the names of its members, and their liability had to be enforced against each member." 259 U.S. at 385. The Court held in *Coronado,* however, that this general rule should not be applied to prevent a suit for damages under federal law against the United Mine Workers of America. The Court gave several reasons for its ruling, but primarily emphasized the wealth, power, and cohesiveness of the union as requiring that it be amenable to suit.

> "The body governing the union in the interval between conventions is the International Board consisting of the principal officers, the president, vice-president and secretary-treasurer, together with a member from each district. The president has much power. He can remove or suspend International officers, appoints the national organizers and subordinates, and is to interpret authoritatively the constitution, subject to reversal by the International Board. When the Board is not in session, the individual members are to do what he directs them to do." 259 U.S. at 383-84.

"The membership of the union has reached 450,000. The dues received from them for the national and district organizations make a very large annual total, and the obligations assumed . . . are so heavy that an extensive financial business is carried on, money is borrowed, notes are given to banks, and in every way the union acts as a business entity, distinct from its members. *No organized corporation has greater unity of action, and in none is more power centered in the governing executive bodies.*" 259 U.S. at 385.

"It would be unfortunate if *an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of four hundred thousand members* in carrying on, in a wide territory, industrial controversies and strikes . . . could assemble its assets to be used therein free from liability for injuries by torts committed in the course of such strikes. To remand persons injured to a suit against each of the 400,000 members to recover damages . . . would be to leave them remediless." 259 U.S. at 388-89. (Emphasis supplied.)

The Court held that the contrary law of the forum state would not prevent the union from being sued on a federal claim in federal court. 259 U.S. at 391.

The rule of the *Coronado* case was codified in Rule 17(b) of the Federal Rules of Civil Procedure, which states that, regardless of its capacity under the laws of the forum state, an unincorporated association "may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States." The Advisory Committee comment on Rule 17(b) states that the rule "follows the existing law as to such associations," and that the existing law is stated in *United Mine Workers* v. *Coronado Coal Co.* However, the Rule provides no definition or standards for determining what aggregates of persons should be deemed to be "unincorporated associations," subject to suit in federal court. Neither have guidelines resulted from lower court decisions.[7]

The present case presents what is possibly the most expansive interpretation to date of the unincorporated association provision of Rule 17(b). Surely, the United Methodist Church bears little resemblance to the union involved in the *Coronado* case. The union had a strong and continuing central management headed by a powerful president; the denomination has no central management and no executive officers whatever. The union held massive funds in its own name; the denomination as such holds no funds. The union engaged in a wide variety of commercial activities as

[7] Several lower courts have considered problems in the definition of a suable "unincorporated association," but no clear definition has emerged. In *Penrod Drilling Co.* v. *Johnson*, 414 F.2d 1217, 1222, the court defined the term by reference to 7 C.J.S. Associations § 1, at p. 19 (1937): "An 'association' is a body of persons acting together, without a charter, but upon the methods and forms used by corporations, for the prosecution of some common enterprise." It has been suggested that the "association" as used in Rule 17(b) "refers to associations such as trade unions, fraternal organizations, business organizations, and the like." *Yonce* v. *Miners Memorial Hospital Assn., Inc.*, 161 F.Supp. 178 (W.D. Va. 1958) (welfare fund of a union held not subject to suit as an unincorporated association), and one court looked to the absence of bylaws, offices, a mailing address, bank accounts, assets and obligations in determining that a committee of a sports association could not be sued as an unincorporated association, *California Clippers, Inc.* v. *United States Soccer Football Assn.*, 314 F.Supp. 1057, 1068 (N.D. Cal. 1970). Interpreting the parallel provision of its state Rule 17, the Colorado Supreme Court concluded that an unincorporated association should have "responsible officers elected according to by-laws." *Hidden Lake Development Co.* v. *District Court*, 183 Colo. 168, 173, 515 P.2d 632, 635 (1973). That court said: "the status of an unincorporated association must be founded on more than a bald allegation. To sue as an incorporated association in name only is insufficient. Such legal entity must in fact exist. . . ." *Id.*

an entity apart from its members; the denomination as a whole has engaged in no such activity. The denomination is, in fact, a "connection," as it has long been described, of many separately organized church bodies, and it is those suable entities which carry on the denomination's religious work. There is no overarching central management; indeed, apart from the individual members, the local churches, the conferences, the general boards, and their affiliated agencies, there simply is no United Methodist Church against which a legal broadside action can be brought.

The district court did not make any findings of fact to contradict the specific assertions set forth above. And, critically, the district court cited no standards for determining whether a given aggregation should be considered as an "unincorporated association" under Rule 17(b). Rather, this court engaged in a detailed review of *The Book of Discipline,* unaided by expert testimony, and then held that the Church was suable as an unincorporated association because:

(1) *The Book of Discipline* provides that all property of any entity of the denomination (i.e. local churches and other sub-units) is held in trust for the denomination as a whole. Transcript of proceedings, Aug. 15, 1978, Appendix C hereto, at A-10. On the other hand, the expert testimony which was disregarded shows that the trust clause relates to property held by the many separate units of United Methodism through their separate boards of trustees and entities and that there is no title-holding entity known as the United Methodist Church. Leiffer Dep. at 148-149; Wayland Dep. at 226.

(2) Various sections of *The Book of Discipline* provide that the United Methodist Church will assume responsibility for contracts made by and title of property held by either of the two churches which merged to form the denom-

ination. App. C at A-10, 11. Similarly, the expert testimony shows that these sections are to be read in the knowledge that contracts are made and titles held by the individual units constituting the denomination. App. Ex. 2, ¶ 2.

(3) Other paragraphs of *The Book of Discipline* refer to the denomination owning charitable institutions and having employees. App. C at A-11. Again, expert testimony revealed that the institutions and employees referred to are those of the separate units. App. Ex. 2, ¶ 2.

(4) GCFA applied for a federal income tax exemption in the name of the denomination, and administers its "general funds." App. C at A-11. The evidence shows that the Internal Revenue Service followed an administratively convenient course in referring in the exemption ruling issued to General Council on Finance and Administration, to the denominational name. App. Ex. 3 and attachments.

(5) *The Book of Discipline* gives the bishops of the denomination the duty of overseeing or superintending its affairs. App. C at A-12. As shown above (pp. 9-10), the expert evidence is clear that the Council of Bishops simply is not the managing board of all United Methodism. Leiffer Dep. at 142.

(6) The denomination has been involved in other litigation, and has been held by the courts to be a "hierarchical" church. App. C at A-13, 14. This finding represents an erroneous understanding of how the denominational name came to be used in certain litigated cases involving local units and their properties. Frank Jones affidavit, App. Ex. 5.

None of these points as cited by the district court, even as the court interpreted them, contradicts the decentralized, connectional nature of the denomination. Thus, there is no factual basis for any conclusion that the denomination operates with a centralized structure or authoritarian polity.

Obviously, property can be in trust for a loosely organized as well as a tightly organized group. *The Book of Discipline* occasionally refers to the denomination holding property, assuming contracts, or having employees instead of referring to the constituent church bodies and separate entities which actually hold the property, make the contracts, or have the employees. GCFA's application for a group tax exemption merely noted the common status of many entities within the denomination; it nowhere indicated a centralized Church executive. And finally, none of the prior litigation involving the United Methodist Church ever resulted in a finding that the denomination, as a whole, was a jural entity subject to suit. To the contrary, all such litigation was brought or defended by local denominational units. There has never before been a claim for damages against the denomination as a whole.[8] And, of course, the

[8] In the entire history of the United Methodist Church and its predecessors, there is only one reported case in which the name of the entire denomination appeared in the caption. ***The United Methodist Church*** v. ***St. Louis Crossing Independent Church,*** 150 Ind. App. 574, 276 N.E.2d 916 (1972). This suit was brought by schismatic members of a local church, seeking an injunction enforcing their claim to the property of the local church. They named the denomination as a defendant, but the action was defended by a district superintendent and local interests, 276 N.E.2d at 917. The capacity of the denomination was not relevant or at issue.

There are three similar trial court actions in Georgia which are unreported. In each case, a dissident group had attempted to take over the property of a local church, and the name "The United Methodist Church" was used by the annual conference and local authorities which actually brought suit against the dissidents, in order to indicate that the interests of all United Methodists were involved. See Jones affidavit, App. Ex. 5, ¶ 4. Nevertheless counsel for plaintiffs insisted below that The United Methodist Church, as an entity, has frequently involved itself in litigation. These representations are not accurate although repeatedly made.

fact that the United Methodist Church is hierarchical does not indicate that it has a highly centralized government, holds assets, or acts as an entity.[9]

The effect of the district court's decision is thus to expand the meaning of "unincorporated association" so as to encompass nearly any aggregation of persons or entities acting under a common name, and with some intercommunication.[10] The "Bell System" would be suable as an unincorporated association under this rationale, as would the "Anti-War Movement", the "Federal Judiciary" and every major religious denomination. Such a result has no basis in this Court's reasoning in the *Coronado* case. If allowed to stand it will necessarily encourage a multiplicity of suits, create enormous practical problems in the conduct of litigation, and result in serious denials of due process.

The present case presents these problems in at least three areas. First, because the district court allowed this suit to

[9] The term "heirarchical," as developed by courts in determining church property disputes, is used in opposition to the "congregational" form of church government, "in which the autonomy of the local congregation is the central principle." Note, Judicial Intervention in Disputes over the Use of Church Property, 75 Harv. L. Rev. 1142, 1143-44. The "connectionalism" of the United Methodist Church is simply one form of church government within the broad hierarchical category. *Id.*, at 1144 n.14; ***Brady*** v. ***Reiner,*** 198 S.E.2d 812, 827 (W. Va. 1973).

[10] Indeed, the plaintiffs argued below that the only defining characteristics of an "unincorporated association" are common name and common purpose. "There is no complicated formula for determining what an unincorporated association is—it simply is a group whose members share a common purpose and a common name." Plaintiffs Consolidated Memorandum in Opposition to Defendants' Motions (June 30, 1978) at 45.

be maintained against a vast aggregation of persons and units without a common bond and unified management structure there is a persisting question: who is to conduct the defense of the lawsuit? This was no problem in *Coronado,* where the Internal Board and a powerful president governed the union being sued. Here, the denomination is now in default in a $5 million law suit because, under its ecclesiastical law, no one can answer.[11]

Moreover, even if there were no prohibition against speaking for the denomination, the organization of The United Methodist Church is so diffuse that there is, in fact, no person or entity in a position to act as spokesman, binding others with his or its judgments. The district court has never identified any person whom it believes could act as such a spokesman or be responsible to file an answer and otherwise direct the defense of the denomination.

Similarly, there is no one within the denomination who can require the thousands of local churches, regional conferences and general boards to respond to requests for information.

[11] Plaintiffs apparently believe that GCFA can answer for the denomination as a whole, pointing to Paragraph 970(4) of *The Book of Discipline,* which empowers GCFA "[t]o take all necessary legal steps to safeguard and protect the interests and rights of The United Methodist Church." The paragraph goes on to specify, however, that GCFA is to make provision for legal counsel only at the request of a general agency or bishop—presumably in connection with litigation affecting a constituent body of the Church. Plaintiffs do not explain how GCFA could engage in litigation on behalf of the whole Church when Paragraph 612 of *The Book of Discipline* expressly forbids this. "No person, no paper, no organization has the authority to speak officially for The United Methodist Church, this right having been reserved exclusively to the General Conference under the Constitution."

See also Judicial Council Ruling No. 485, Appendix E hereto attached, specifically holding that GCFA has no authority to appear for the entire denomination.

Trial preparation and responses to discovery are thus not possible.[12] The district court, again, has not indicated anyone who can assemble the information necessary to conduct litigation for the denomination as a whole.

In *Coronado,* this Court cited, as one of the bases for allowing suit against The United Mine Workers, the fact that "equitable procedure . . . has grown to recognize the need of representation by one person of many, too numerous to sue or be sued," 259 U.S. at 387, and the union officers in *Coronado* would doubtless have satisfied the requirements of the present rule on class actions. Fed.R.Civ.P. 23. Yet, in the present case, there is not even a "class representative" apparent, let alone one who "will fairly and adequately protect the interests" of the millions of members and thousands of constituent units of The United Methodist Church, not specifically named as defendants. Any judgment entered against the denomination without adequate representation of these units which constitute it, would be a manifest denial of due process. *Hansberry* v. *Lee,* 311 U.S. 32 (1940).

The second area of procedural difficulty created by the district court's decision is in the enforcement of any judgment. In *Coronado,* there were well-defined union assets, in particular, a common strike fund. Thus, this Court held, "funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by . . . unions in strikes." 259 U.S. at 391. In the present case, there are no assets held by the United Methodist Church as an entity, but only the assets of many separate United Methodist entities, held for the specific purposes of

[12] Nevertheless, plaintiffs have served an exhaustive document request on the denomination as a whole, apparently expecting a central source to collect and produce documents from each of the literally thousands of units comprising the United Methodist connection. A copy of this request is bound herewith as Appendix D.

those separate church bodies. By suing the name of an entire denomination, plaintiffs seek to levy against assets held by these separate entities. While plaintiffs have never been specific about the units against whom they would seek to enforce any judgment, they have laid claim to all contributions made for the national and global ministries of the denomination, regardless of which entity holds these funds. Answer to Petition for Hearing in *Barr, supra,* at 43 n.25. Thus, the denomination has been named even though GCFA, which acts as a conduit for over $60 million in general contributions each year, is already an answering defendant. Plaintiffs apparently hope to levy against the general funds held by all of the general boards, the annual conferences, and perhaps even local church treasuries.[13]

Such a procedure is wholly contrary to due process. It is a basic tenet of our law that persons subject to judgment must be given notice and an opportunity to be heard. *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306 (1950). Yet the thousands of local United Methodist churches and church related institutions and scores of annual conferences, whose property may be subject to levy by reason of a damage action brought against the Church, have had no notice and no opportunity to be heard, despite their separate jural status.

In *Roman Catholic Archbishop* v. *Superior Court,* 15 Cal.App.3d 405, 93 Cal.Rptr. 338 (1971), an action for damages was brought against "the Roman Catholic Church." However, the plaintiff specified the church entity against

[13] In argument on petitioners' motion to dismiss in *Trigg,* counsel for plaintiffs answered the district court's question as to why the Church was sued as an entity as follows: "Because I believe, your Honor, that it is the only entity that has sufficient funds to respond in damages to make the plaintiffs whole in this case." Transcript of August 14, 1978 at p. 37.

whom he expected to collect his judgment—the Roman Catholic Archbishop of San Francisco, a corporation sole. Accordingly, the archbishop was able to obtain summary judgment on the ground that he had nothing to do with the underlying dispute (between plaintiff and some Swiss monks). Plaintiffs in the present case are attempting a similar suit, except that they do not specify the constituent entity against whom they seek recovery. They propose to proceed to judgment and then, if they are successful, litigate only the question of whether the assets of a given unit of United Methodism are denominational assets.

A third problem resulting from an extreme application of the unincorporated association fiction arises when, as here, liability of some or all defendants is predicated on allegations, which those defendants dispute, that they are in "alter ego" or "control person" relationships with one another. Such issues, in a normal setting, would properly turn on evidence adduced on the merits—not be decided at the threshhold of a case at the point of joinder of parties. Here, in the very act of creating under Rule 17(b), a single unified party defendant (The United Methodist Church) out of a vast group of separate religious units, the trial court might be read as having effectively preempted and concluded that issue. In fact the trial court stated:

> "[T]he courts have held that though there is a connectional quality to the United Methodist Church, *the connection is so thorough and binding that all parts of the organization are controlled by and must respond to the will and authority of The United Methodist Church.*" (Emphasis added)
>
> Appendix B, at A-13.

For these reasons petitioners cannot accede to the suggestion of the district court simply to allow the default against the Church to become final, and appeal it separately.[14] The

[14] See oral opinion attached hereto as Appendix B, at A-19, 20.

consequences of such a default judgment, if affirmed, for the thousands of units of the United Methodist Church are potentially devastating. Plaintiffs, by failing to name those units they intend to enforce a judgment against, have attempted to put all the constituent units of the denomination in a position where they must gamble on how the legal capacity of the denomination to be sued as an unincorporated association will be decided and whether their assets will be considered those of the denomination. Yet, as the First Circuit Court of Appeals stated in criticizing a plaintiff for failure to name parties, "we are engaged in a lawsuit, not a poker game. . . ." *Stevens* v. *Loomis,* 334 F.2d 775, 776 n.1 (1st Cir. 1964).

Petitioners believe that the United Methodist Church in its denominational entirety should not be considered a jural entity. However, even if the denomination is to be held subject to suit for the first time in its 200 year history, there should be procedures determined now to allow for proper representation of the denomination and definition of the assets subject to judgment satisfaction procedures. The decision of the district court, allowing suit to be maintained without consideration of these problems leaving to the two hand-picked persons served with process to respond to these problems as best they can, flatly offends due process. The question of the status of the United Methodist Church is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Loan Corp.,* 337 U.S. 541, 546 (1949).

As in the past where federal procedural questions have involved important constitutional questions, certiorari should be granted here to review the denial of relief by mandamus. *Schlagenhauf* v. *Holder,* 379 U.S. 104 (1964) (application of Fed. R. Civ. P. 35 regarding medical examinations); *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959) (right to jury).

II. RULE 17(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE CANNOT, CONSISTENT WITH THE CONSTITUTIONAL GUARANTY OF FREE EXERCISE OF RELIGION, BE INTERPRETED TO RENDER LIABLE TO A SUIT FOR DAMAGES A RELIGIOUS DENOMINATION COMPOSED OF MANY SEPARATE ENTITIES WITH NO UNIFIED AUTHORITARIAN STRUCTURE, MANAGING BOARD OR EXECUTIVE OFFICERS AND NO JOINT DENOMINATIONAL ASSETS.

The due process concerns outlined in Part I, above, would exist whenever Rule 17(b) is applied against an "unincorporated association" composed of many separate individuals and organizations without a central executive, joint funds in the association's name, or other quasi-corporate characteristics. The present case, however, involves a religious denomination, and so the Free Exercise Clause of the First Amendment is also seriously implicated here.

In a series of cases culminating in *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696 (1976), this Court has emphasized that the free exercise of religion, protected by the First Amendment, includes not only the right to believe in church dogma, but also the right to organize church government or polity free from intrusion by the state.[15]

[15] The Court has also cautioned against civil court interpretation of religious law and polity. "It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith [of large denominations] as the ablest men in each are in reference to their own." *Watson* v. *Jones,* 13 Wall 679, 729 (1872), quoted in the *Serbian Church* case, 426 at 714-15 n.

By relying on its own interpretation of the ecclesiastical laws of United Methodism, and ignoring the expert opinion of churchmen on these matters, the district court directly contravened this warning.

Thus, in the *Serbian Church* case, the Court refused to allow a state judiciary to overturn the decision of the Serbian Orthodox Church regarding a matter of diocesan reorganization. The Court relied on *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952) for the principle that "religious freedom encompasses the power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." 426 U.S. at 721-22. Similarly, in its very recent decision in *NLRB* v. *Catholic Bishop,* U.S. , 47 U.S.L.W. 4283 (March 21, 1979), the Court interpreted the National Labor Relations Act not to accord jurisdiction over church schools to the NLRB, for fear that enforced collective bargaining might impermissibly intrude on religious concerns. Cf. *McClure* v. *Salvation Army,* 460 F.2d 553, 560 (5th Cir. 1972) (interpreting Title VII of the Civil Rights Act of 1964 not to apply to the employment of ministers by a church).

The decision of the district court below, allowing a multimillion dollar damage action to be brought against the entire United Methodist denomination, poses a serious challenge to the form of government which the denomination has chosen.[16]

In order for the denomination, in its entirety, to respond to such suits in an effective fashion, it cannot retain the

[16] The *Trigg* case is only one of a series of lawsuits filed by plaintiffs' counsel involving the "United Methodist Church" as an unincorporated association. Others are *Barr, et al.,* v. *The United Methodist Church, et al.,* No. 404611 (Sup. Ct., San Diego Cty. Cal.), and *Barr, et al.* v. *State of California,* No. 413987 (Sup. Ct., San Diego Cty. Cal.). The total damages claimed in these suits, all arising from the retirement homes involved in the present case, are well over one half billion dollars.

decentralized and non-authoritarian "connectionalism" which is the hallmark of its government. Rather, in order to protect their individual assets, the separate entities of United Methodism would henceforth require a central executive capable of (1) speaking for the denomination, (2) directing the separate entities to cooperate in litigation, and (3) overseeing their affairs to insure against conduct threatening the denomination with legal action. Moreover, the denomination would be required to establish some clearly demarcated joint or pooled funds so as to distinguish the separate assets of the respective church units from joint denominational assets sought to be subjected to judgment satisfaction efforts. This would effectively overturn 200 years of Methodist tradition. See Leiffer affidavit, App. Ex. 1, ¶ 7. It would put United Methodism into a mold in which it cannot fit without drastic reorganization.

For the separate entities within the denomination to protect their assets, there is only one alternative to centralization, and that is to enforce disaffiliation. This has already begun under the promptings of plaintiffs' Pacific Homes litigation, of which the instant case is but a part. *Yellowstone Conference of The United Methodist Church* v. *Street,* No. 24487 (Dist. Ct. for the 18th Jud. Dist., Montana, May 17, 1978) involves an attempt by the trustees of an orphanage and hospital long associated with one of the annual conferences of the denomination and heretofore operated by the United Methodist deaconesses, to sever its relationship with the denomination. In their pleadings and in discovery, the Trustees made clear that the only reason for their action was fear that judgments in the California litigation against the United Methodist Church would be levied against the property they administered—causing them to cease operations and withdrawing the hospital and home from the

community. The threat of judgment execution against the separate units of United Methodism has a palpable chilling effect on religious and charitable service.

Of course, the interests of religion are not absolute. However, in dealing with religions, the government may intrude only on behalf of "those interests of the highest order and those not otherwise served." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). In the present case, there is no compelling need to force the United Methodist denomination to act as a monolith. The individual units of the denomination are jural entities subject to suit, and those involved in the present case have presumably been named already. Should plaintiffs believe that they have a cause of action against every unit within the United Methodist connection, they may allege a defendant class action. The decision of the district court wholly failed to consider either the impact on the exercise of religion of its application of Rule 17(b) or the alternatives to that application. In order to protect the chosen government of The United Methodist Church, this Court's review is needed.

CONCLUSION

For the reasons stated above, petitioners respectfully pray that their petition for a writ of certiorari be granted.

Respectfully submitted,

ALBERT E. JENNER, JR.
KEITH F. BODE
EUGENE R. WEDOFF

JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

SAMUEL W. WITWER, SR.
SAMUEL W. WITWER, JR.

WITWER, MORAN, BURLAGE & ATKINSON
125 S. Wacker Drive
Chicago, IL 60606
(312) 332-6000

ALLAN J. RENICHE
DANIEL R. SALAS
WILLIAM F. FAHEY

SULLIVAN, JONES & ARCHER
1400 Financial Square
600 'B' Street
San Diego, CA 92101
(714) 236-1611

Attorneys for those persons upon whom service of process was attempted on behalf of The United Methodist Church.

APPENDIX

TABLE OF APPENDICES

FILED
March 13, 1979
Emil E. Melei, Jr. Clerk
U. S. COURT
OF APPEALS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL W. MILHOUSE and EWING T. WAYLAND, etc., *Petitioners,* vs. UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, *Respondent,* and CHARLES W. TRIGG, AVETTA TRIGG, et al., *Real Parties in Interest.*	No. 78-3398 D.C. No. 78-0198 Southern California ORDER

Before: Judges Wallace and Hug, Circuit Judges

Upon due consideration, the court issues the following order:

1. The motion to dismiss, quash or strike Petitioner's petition for writ of mandamus is denied.

2. The motion by the National Council of Churches to appear as amicus curiae is granted and its "brief" tendered is ordered filed, and

3. The petition for writ of mandamus is denied. Applying the guidelines set forth in *Bauman* v. *U.S.D.C.*, 557 F.2d 650 (9th Cir. 1977), the Court finds that petitioners' contentions do not warrant the exercise of this Court's discretion. See *Kerr* v. *U.S.D.C.*, 426 U.S. 394 (1976).

FILED
ENTERED
August 23, 1978
CLERK U. S.
DISTRICT COURT
SOUTHERN DISTRICT
COURT OF
CALIFORNIA
By Clerk

APPENDIX B

WILLIAM S. LERACH
GREGG A. JOHNSON
FREDERIC J. MILBERG
MILBERG WEISS BERSHAD & SPECTHRIE
1720 Central Federal Tower
225 Broadway
San Diego, California 92101
Telephone: (714) 231-1058

COLIN W. WIED
DAVID J. YARDLEY
WIED, GRANBY & ALFORD, A.P.C.
1260 Bank of California Plaza
110 West A Street
San Diego, California 92101
Telephone: (714) 231-8700

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHARLES W. TRIGG, et al., *Plaintiffs,* vs. PACIFIC METHODIST INVESTMENT FUND, et al., *Defendants.*	Civil Action No. 78-0198-S

ORDER (1) DENYING MOTIONS TO DISMISS DEFENDANTS UMC, GCFA, PSWAC AND, FRANCOEUR & COMPANY; (2) GRANTING IN PART DEFENDANT'S MOTIONS FOR A MORE DEFINITE STATEMENT; (3) GRANTING IN PART OBJECTIONS TO EVIDENCE AND MOTION TO STRIKE; AND (4) DENYING PLAINTIFFS' MOTION FOR SANCTIONS

On August 15, 1978, the following motions came on for oral argument before the Court, the Honorable Edward J. Schwartz presiding:

(1) Motions by Persons Upon Whom Service of Process Was or May Have Been Attempted On Behalf of The United Methodist Church to Dismiss (i) For Lack of Jurisdiction Over The United Methodist Church, (ii) For Failure to State a Claim Under § 17 of the Securities Act of 1933, and (ii) For Failure to Plead Fraud With the Required Particularity.

(2) Motions by Defendant General Council on Finance and Administration of The United Methodist Church to Dismiss (i) For Lack of Jurisdiction and Venue, (ii) For Failure to State a Claim Under § 17 of the Securities Act of 1933, and (iii) For Failure to Plead Fraud with the Required Particularity.

(3) Motions by Defendant Pacific and Southwest Annual Conference of The United Methodist Church to Dismiss (i) For Failure to State a Claim upon Which Relief Can Be Granted, (ii) For Failure to State a Claim Under § 17 of the Securities Act of 1933, and (iii) For Failure to Plead Fraud with the Required Particularity; and for Summary Judgment based on the "No Action" Provision of the Indenture Covering the Collateral Trust Bonds.

(4) Motions by Defendant Francoeur & Company to Dismiss (i) For Failure to State a Claim Under § 17 of the Securities Act of 1933, and (ii) For Failure to Plead Fraud with the Required Particularity.

(5) Motions by Persons Upon Whom Service of Process Was or May Have Been Attempted On Behalf of The United Methodist Church, General Council on Finance and Administration of The United Methodist Church, Pacific and Southwest Annual Conference of The United Methodist Church, Pacific Methodist Investment Fund and Francoeur & Company for a More Definite Statement.

(6) Motion to Strike and Objections to Evidence by Persons Upon Whom Service of Process Was or May Have Been Attempted On Behalf of The United Methodist Church and Defendant General Council on Finance and Administration of The United Methodist Church.

(7) Motion for Sanctions Seeking Attorneys' fees and expenses filed by Plaintiffs.

Sullivan, Jones and Archer, by John L'Estrange, Jr., and Robert V. Vallandigham, Jr., and Witwer, Moran, Burlage & Atkinson, by Samuel W. Witwer, Sr. and Samuel W. Witwer, Jr., appeared for Persons Upon Whom Service of Process Was or May Have Been Attempted On Behalf of The United Methodist Church and the General Conference on Finance and Administration of The United Methodist Church. Musick, Peeler and Garrett, by John R. Browning and William McD. Miller, III, appeared for The Pacific and Southwest Annual Conference of The United Methodist Church. McCutchen, Black, Verleger & Shea, by Bill E. Schroeder, appeared for Francoeur & Co. Hahn, Cazier, Hoegh & Leff, by Peter Longanbach, appeared for Pacific Methodist Investment Fund and various individual defendants.

Milberg Weiss Bershad & Specthrie, by William S. Lerach and Gregg A. Johnson, and Wied, Granby & Alford, by Colin W. Wied and David J. Yardley, appeared for the Plaintiffs.

The Court, after hearing oral argument, and upon consideration of the pleadings, memoranda and evidence submitted by the parties;

HEREBY ORDERS THAT:

(1) The Motion to Dismiss for Lack of Jurisdiction Over Defendant The United Methodist Church is denied;

(2) The Motion to Dismiss for Lack of Jurisdiction and Venue as to Defendant General Council on Finance and Administration of The United Methodist Church is denied;

(3) The Motions of Persons Upon Whom Service of Process was or May Have Been Attempted on Behalf of The United Methodist Church and Defendants General Council on Finance and Administration of The United Methodist Church, Pacific and Southwest Annual Conference of The United Methodist Church and Francoeur & Company to Dismiss for Failure to State a Claim Under § 17 of the Securities Act of 1933 and for Failure to Plead Fraud with Particularity are denied;

(4) The Motions to Dismiss and for Summary Judgment by Defendant Pacific and Southwest Annual Conference of The United Methodist Church are denied;

(5) The Motions for a More Definite Statement by Defendants General Council on Finance and Administration of The United Methodist Church, Francoeur & Company, Pacific and Southwest Annual Conference of The United Methodist Church and Pacific Methodist Investment Fund are granted to the extent of requiring named Plaintiffs to more definitely plead the date(s) which they actually learned of the untrue statements and omissions alleged in the complaint and are otherwise denied;

(6) The Motion to Strike and Objection to Evidence by Persons Upon Whom Service of Process Was or May Have Been Attempted On Behalf of The United Methodist Church and Defendant General Council on Finance and Administration of The United Methodist Church is denied in part and granted in part as ruled upon by the Court during the argument and as set forth in the transcript of the proceedings;

(7) Plaintiffs' Motion for Sanctions seeking Attorney's fees and expenses is denied.

IT IS FURTHER ORDERED THAT (1) the application to permit an interlocutory appeal pursuant to the provisions of 28 U.S.C. 1292(b) from the denial of the motion to dismiss The United Methodist Church for lack of jurisdiction is denied; (2) Plaintiffs are to file an amended com-

plaint forthwith; and (3) Defendants shall file a response to Plaintiffs' amended complaint within twenty (20) days after the service of the amended complaint.

DATED: Aug. 23, 1978

EDWARD J. SCHWARTZ
UNITED STATES DISTRICT JUDGE

Approved as to form.

DATED: Aug. 18, 1978

SULLIVAN, JONES & ARCHER

By JOHN L'ESTRANGE, JR.

On Behalf of All Defendants

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
THE HONORABLE EDWARD J. SCHWARTZ,
JUDGE PRESIDING

CHARLES W. TRIGG, et al., *Plaintiffs,* vs. PACIFIC METHODIST INVESTMENT FUND, et al., *Defendants.*	No. 78-0198-S HEARING MOTIONS

PARTIAL REPORTER'S TRANSCRIPT
OF PROCEEDINGS

San Diego, California

August 15, 1978

PATRICIA E. LUX, CSR NO. 3477
OFFICIAL PRO TEMPORE REPORTER
UNITED STATES DISTRICT COURT
United States Courthouse
940 Front Street
San Diego, California 92189

as brief as they reasonably can be. And I don't know who wants to start the presentation, but these are, of course, defense motions, and it would be for the defendants to commence.

(Argument by Mr. Witwer, Sr., and Mr. Lerach, reported but not herein transcribed, after which the following proceedings were had:)

THE COURT: Now, we do have a number of motions that are going to be argued, but I think in order to maintain the continuity that has been established by the argument on behalf of defendants and the argument on behalf of plaintiffs, I'm going to proceed and make a ruling on this particular motion, and then we can take a recess and go on to the others.

In this particular motion that is brought in the usual manner, according to the motion and memoranda supplied by the attorneys for persons upon whom service of process was or may have been attempted on behalf of the United Methodist Church, in this motion the counsel for these parties, and I take it on behalf of the United Methodist Church, have moved to dismiss, and particularly to dismiss the United Methodist Church, primarily on the ground that it is only a connectional or religious polity, and not a jural entity.

In response to the motion the plaintiff contends that the Methodist Church is sueable as an unincorporated association, namely a hierarchical, jural entity, and this is done under either 388 of the California Code of Civil Procedure or under Rule 17b of the Federal Rules of Civil Procedure, both of which speak of and indicate the sueability of an unincorporated association.

Now, I've considered the documents filed, the arguments made. I've spent a good deal of time with the Book of Discipline of the United Methodist Church, which is a

rather carefully structured document outlining the—well, doing more than outlining. It outlines, and then fills in with great detail, the organization of the United Methodist Church and its various affiliates, agents, and subordinates, and I must compliment the drafters on the thoroughness of the Book of Discipline, because I think it provides a complete scheme and structure of the organization of the United Methodist Church and gives a substantial indication of the controlling factors and influences that are operative within the United Methodist Church.

Throughout the Book of Discipline it is provided that at every level of authority that any unit which holds property does so in trust for the United Methodist Church, and there is no need to go into the many sections or paragraphs of the Book of Discipline in which that is specifically set forth.

Moving right on from the bottom; that is, from the local churches, on up through every property-holding level there is that provision, that that property is held in trust for the United Methodist Church, which does seem to be some indication of a superior control; that is. I find it difficult to visualize that such a provision were necessary at all if the intention were that there was to be no higher level control over the property of the local units or the intermediate units. Why mention it? Why indicate at all that there is some kind of ultimate beneficiary or trust holding for the benefit of the United Methodist Church?

Contractual participation and responsibility is provided for in the Book of Discipline. Paragraph 670 reads in part as follows: "The United Methodist Church assumes responsibility for all contractual agreements made by one of its constituent members (Evangelical United Brethren and Methodist Churches), with an affiliated autonomous church."

Now, as against that, Mr. Witwer has pointed out another provision, that what is contained in one of the paragraphs

of the Book of Discipline, that specifically denies responsibility for a particular—or rather in a particular specified situation. I believe that was under paragraph 702, subsection 2.

Now, the constitution of the United Methodist Church provides in Article 6 that, quote: "Titles to properties in The Evangelical United Brethren Church and the Methodist Church shall, upon consummation of the union, automatically vest in The United Methodist Church."

Again, the question was raised, I suppose, why use that kind of language at all if there is no legal entity that could be considered under the name United Methodist Church? Why is it necessary to say that that property vests in the United Methodist Church?

Now, among its various properties, according to the Book of Discipline, paragraph 2445, the United Methodist Church owns and controls, "schools, colleges, universities, hospitals, homes, orphanages, institutes, and other institutions," and a good deal of attention has been paid in the papers filed to the fact that the United Methodist Church has arranged, through its General Council on Finance and Administration, for a blanket insurance policy covering various properties and activities of the Church, in which the United Methodist Church itself is a named insured.

According to paragraph 1701 of the Book of Discipline, the United Methodist Church has employees subject to pension plans.

Subparagraph 2 of paragraph 1701 provides: "The general supervision and administration of the pension and benefit funds, plans, and programs of the United Methodist Church, subject to the direction, supervision, and control of the board, shall be conducted by and through the headquarters office."

As is common with most church organizations, application was made to the Internal Revenue Service for an exemption

from Federal taxation, and it was applied for and issued in the name of the United Methodist Church and its affiliated organizations.

A good deal of discussion has taken place in the papers filed, and in argument this morning, with regard to the function of the General Council on Finance and Administration, and it has been pointed out that this is a very active body, or agency, entity, or whatever it might be called, corporation, evidently, which exercises a permeating administration and control of certain aspects of finances of the Methodist hierarchical structure. It is true, evidently, as stated by Mr. Witwer, that it administers only approximately five or five and a half percent of the total collections or givings obtained at the local level, but when that small percentage is translated into dollars, it comes to some sixty or sixty-five million dollars, a very substantial sum, and certainly as to that fund, or those funds, the General Council on Finance and Administration is the fiscal arm of the United Methodist Church.

The bishops of the Church who form the General Conference, if one looks at the Book of Discipline, have rather broad governing powers and have a responsibility under paragraph 513 of the Book of Discipline, quote: "To lead and oversee the spiritual and temporal affairs of the United Methodist Church," and so on, closed quote.

Some reference has been made to the superintendency of the bishops, and I think paragraph 501 of the Book of Discipline is worth reading in full. Paragraph 501 is entitled: "Task—The task of superintending in the United Methodist Church resides in the office of bishop and extends to the district superintendent with each possessing distinct responsibilities. From apostolic times, certain ordained persons have been entrusted with the particular tasks of superintending. Those who superintend carry primary responsibility for ordering the life of the Church. It is their task to enable the gathered Church to worship and to evangelize faithfully."

Up to this point it's certainly a statement of religious work and responsibility. Paragraph 501 goes on: "It is also their task to facilitate the initiation of structures and strategies for the equipping of Christian people for service in the Church and in the world in the name of Jesus Christ and to help extend the service in mission. It is their task, as well, to see that all matters, temporal and spiritual, are administered in a manner which acknowledges the ways and the insights of the world critically and with understanding while remaining cognizant of and faithful to the mandate of the Church. The formal leadership in the United Methodist Church, located in these superintending offices, is an integral part of the system of an itinerant ministry."

It has been brought to the attention of the Court, by reason of the points and authorities filed and the cases cited, that the United Methodist Church has participated in numerous litigations as both party plaintiff and party defendant, asserting its property rights, its organizational authority, and the courts which have considered the legal status of the United Methodist Church have found it to be a hierarchical church organization, as distinguished from a merely congregational form of organization, and the courts that have addressed the problem have held that the United Methodist Church is a jural entity possessing property rights and entitled to both legal and injunctive relief.

Furthermore, the courts have held that though there is a connectional quality to the United Methodist Church, the connection is so thorough and binding that all parts of the organization are controlled by and must respond to the will and authority of the United Methodist Church.

Now, of course, it is argued that the cases in which the United Methodist Church has appeared as a party deal with purely internal church matters. This may be true, but it appears to this Court that it makes very little difference with regard to the problem of jural entity whether the

United Methodist Church is suing as a jural entity, as an unincorporated association, which it's been held to be, to compel action in accordance with its Book of Discipline, or whether it is suing or being sued by reason of other activities which are permitted and engaged in in accordance with the Book of Discipline, and in the administration of the work of the Church, and pursuant to its organizational arrangements.

Now, it is contended on behalf of the United Methodist Church that constitutional principles affecting the establishment and free exercise clauses of the United States Constitution should be applied to preclude this suit, specifically as against United Methodist Church, named as a party defendant.

I think the courts, including the United States Supreme Court, have held otherwise. It's true, not specifically on facts identical with those before this Court, but there have been situations in which suits have been permitted, even against the argument that freedom of religion would somehow be affected or curtailed.

A suit has been allowed against a religious organization, specifically for a cause of action arising out of the Securities Act of the United States.

Now, churches, of course, may exercise both religious and temporal powers, and the United Methodist Church, through its wide ranging, world-wide activities is, in my view, fully on the temporal scene. Its property holdings and monetary collections involve certainly millions, and perhaps billions, of dollars. In matters affecting its property rights and alleged security law violations, the United Methodist Church is able to assert its legal entitlements and is fully answerable in the courts of the United States.

Accordingly, the motion that is brought for dismissal as to the parties or individuals served on behalf of the United

Methodist Church is denied, and if this is a motion to dismiss out the United Methodist Church, it is denied in toto.

MR. WITWER: May I address the Court on another motion?

THE COURT: Yes, certainly. Does it relate to the ruling the Court has just made?

MR. WITWER: Yes.

I would like to thank you, your Honor.

I would like, on behalf of the Methodist Church, to certify under Federal Rule 1292, the importance of the question, and I believe that if that could be a part of your opinion it would expedite the appeal to the Ninth Circuit and would certainly expedite the ultimate disposition of the litigation to avoid any unnecessary delay.

THE COURT: All right.

Mr. Lerach, do you wish to be heard on this?

MR. LERACH: Does your Honor wish to hear argument on this? Because I anticipated this might occur, and I have a number of reasons why I believe it would be a very serious error.

THE COURT: Let's make it very brief, counsel. I don't want extensive argument.

MR. LERACH: Very briefly, your Honor. Your Honor, there will be a more fulsome and complete factual record at the termination of this than there will be if the matter is to be reviewed on appeal.

Your Honor, I have already been involved in an expedited certification to the Supreme Court, before Judge Turrentine, regarding the jury trial. Mr. Weiss can give me the precise dates, because I don't have them. But that issue has

been briefed and awaiting argument for months, and it must be almost two years since Judge Turrentine issued that ruling.

There is no substantial ground for difference of opinion with respect to the decision you have just made. It is right on the facts. It is fully supported by a wealth of decisional law. To permit an interlocutory appeal of this order will do nothing other than delay this case for a minimum of two and a half years, and that is an injustice in the face of the age of the plaintiffs.

MR. WITWER: Your Honor, with complete deference, and our appreciation that you have given to the case the great care that you obviously have, there are points of disagreement, and I can't agree with Mr. Lerach on them, that I think should be reviewed, but I think that one of the dilemmas that I should share with your Honor, at this point, is that so far as I know, I know of no one that can file an answer in this case on behalf of the denomination known as the United Methodist Church, if this were not to be appealed and finally determined somewhere up the line. Indeed, I don't know what could be done, because in the whole structure of this denomination—

THE COURT: Who has appeared for United Methodist in various litigations?

MR. WITWER: I am appearing here today on behalf of two people.

THE COURT: I'm inquiring, Mr. Witwer, who has appeared for United Methodist Church in the various litigations in which they have appeared?

MR. WITWER: There has never been a litigation like this, your Honor.

THE COURT: You're not answering my question. Who has appeared?

MR. WITWER: There have been no appearances on behalf of the denomination, excepting district superintendents, in a local property dispute involving the question of whether or not the church property could be taken out in a schismatic withdrawal. One reported case named the United Methodist Church as a party plaintiff without any authorization, did not make it an entity, but I know of no case, in all of the reported cases, where U.M.C. has ever appeared.

THE COURT: Did the United Methodist Church move to dismiss that case?

MR. WITWER: That case was decided by a court in Indiana, yet I don't know that it even came to the attention of people throughout the whole denomination.

It was mentioned in the masthead of the case, U.M.C., by the district superintendent who brought it. He thought he was doing the right thing. But our problem is simply that we have no one in the structure of this church that has the authority to enter an answer in this court or any other court.

This is not an exaggeration, your Honor. I'm not trying to be dramatic. I'm trying to share with you the predicament we would face if we're not afforded an opportunity to raise this question in the Circuit Court of Appeals as promptly as we can.

We think it's a case that ought not to be delayed. I don't know what the status is of interlocutory petitions, but on a matter of this issue I would hope, as has been the case in my circuit, that it would receive expedited attention, and we would request that.

There is no one, to my knowledge, in United Methodism that has the authority to come in here and file an action. We have come in on behalf of the two bishops that were served to point out that they are not representatives, that they have no authority, and that they could not be served properly. And this was another part of our motion, that there isn't a thing in Methodism that makes that authority recipient, under Rule 4d of the Federal Rules of Civil Procedure.

I believe in the long run that the interests of justice in this case will be greatly advanced if this question can be resolved, and I urge your Honor to give us the necessary certification, because certainly this is a case of great public importance.

THE COURT: Motion is made here under Title 28, section 1292, to treat this an an interlocutory decision for the purpose of taking a direct appeal from this particular order. I presume it's brought under subsection b of 1292, which provides in part as follows—

MR. WITWER: Yes, your Honor.

THE COURT: "When a district judge in making, in a civil action, an order not otherwise appealable under this section shall be of the opinion that such order involves a controlling question of law, as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state, in writing, in such order."

Now, certainly as far as the question of a material or substantial ground for differences of opinion, I would have to grant that that does appear and certainly has been well argued this morning.

When it comes, however, to the question of whether or not such an interlocutory appeal would, in the words of the section, "materially advance the ultimate termination of the litigation," closed quote, I have rather grave doubt.

One of the very troubling parts of considering this motion at all, and in ruling on it, is the considerable amount of evidence that this Court has had to consider in a very compressed time period and under conditions that do not give an opportunity for adequate preparation or presentation by either side, in a trial atmosphere in which the evidence and contentions can be sorted out and considered by the trier of fact with greater care and thoroughness.

I think the entire matter, as to the jural entity and the liability, if any, of the United Methodist Church, can certainly be tested out in a more complete fashion if all of the evidence is presented in the manner in which it would be at trial.

I further have in mind the situation of the plaintiffs that I adverted to earlier, namely that if they have a claim, they are entitled to the earliest reasonable determination of their claim or their respective claims as can be provided by the courts.

I don't think that an interlocutory appeal would expedite. I think, on the other hand, it would probably delay the ultimate determination of the merits of the suit here.

Accordingly, the motion for interlocutory certification is denied.

Now, Mr. Witwer has presented to the Court his pronounced dilemma as to what, if anything, the United Methodist Church should do, in view of the fact that he contends, sincerely, I'm sure, that it is not a jural entity: "What shall I do with regard to appearance or participation at all in the proceedings?" I suppose one way to do it, and I cer-

tainly don't advise this, but if United Methodist Church and its counsel feel that it is not a jural entity, that it is not subject to the process of the Court, it could simply do nothing. I would assume that in the natural course of events a default judgment against the United Methodist Church would be sought, possibly obtained, and I think at that point the United Methodist Church would perhaps have available to it a contest of such default and an appeal from the determination of this Court.

I think if that course were followed, it would be as a separate facet of this suit, which would be carved out, and it would be subject to appeal and resolution, and that the balance of the suit brought on behalf of the plaintiffs could go forward without further hindrance or delay.

We've been going now for quite a while. I wonder if we should simply take a lengthy recess; that is, for the noon hour, and resume after lunch, or whether we could take a short recess now and proceed. I don't really care, but counsel might have some suggestion.

MR. L'ESTRANGE: Your Honor, on behalf of our clients, I think we would prefer to take a more lengthy lunch recess.

MR. LERACH: I was going to suggest the contrary, but that's all right.

THE COURT: It's 25 minutes of 12 now. Why don't we recess until, say, 1:30. Would that be agreeable?

MR. L'ESTRANGE: That would be fine, your Honor.

MR. LERACH: Fine, your Honor.

THE COURT: I trust the arguments this afternoon will be shortened. I felt this was important.

MR. LERACH: Yes, sir. They will be very short.

(Recess.)

APPENDIX D

WILLIAM S. LERACH
GREGG A. JOHNSON
FREDERIC J. MILBERG
MILBERG WEISS BERSHAD & SPECTHRIE
1720 Central Federal Tower
225 Broadway
San Diego, California 92101
Telephone: (714) 231-1058

COLIN W. WIED
DAVID J. YARDLEY
WIED, GRANBY & ALFORD, A.P.C.
1260 Bank of California Plaza
110 West A Street
San Diego, California 92101
Telephone: (714) 231-8700

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CHARLES W. TRIGG, et al., *Plaintiffs,* vs. PACIFIC METHODIST INVESTMENT FUND, et al., *Defendants.*	CV No. 78-0198-S PLAINTIFFS' REQUEST FOR PRODUCTION AND COPYING OF DOCUMENTS

TO: DEFENDANT, THE UNITED METHODIST CHURCH AND ITS ATTORNEYS; AND ALL OTHER PARTIES AND THEIR COUNSEL OF RECORD:

Plaintiffs hereby request, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that Defendant, The United Methodist Church produce and permit Plaintiffs, by

their attorneys, to inspect and copy documents designated below in its possession, or subject to its control.

Plaintiffs request that Defendant, The United Methodist Church, produce, give access, and make available to Plaintiffs by their attorneys, at the offices of Milberg Weiss Bershad & Specthrie, 1720 Central Federal Tower, 225 Broadway, San Diego, California, or such other place as Plaintiffs may designate or as Plaintiffs and the United Methodist Church may agree upon, and permit Plaintiffs by their attorneys to inspect and/or copy the documents hereinafter described at 9:30 A.M., September 25, 1978.

This request for production of documents is intended to cover all documents in the possession of Defendant, the United Methodist Church, its agents, employees, officers, attorneys, and other representatives, or subject to their custody and control, wherever located.

DEFINITIONS

As used herein:

1. "Document" is used in the broadest possible sense and means, without limitation, any written, printed, typed photostated, photographed, recorded, or otherwise reproduced communications or representations, including letters, words, numbers, pictures, sounds or symbols, or combinations thereof, or any copies bearing notations of marks not found on the original including but not limited to all correspondence, memoranda, reports, financial reports, notes, records, letters, envelopes, telegrams, messages (including reports, notes and memoranda of personal or telephone conversations and conferences), studies, analyses, contracts, agreements, projections, working papers, summaries, statistical statements, financial workpapers, accounts, analytical records, reports and/or summaries of investigations, opinions

or reports of consultants, appraisals, trade letters, press releases, comparisons, books, diaries, articles, magazines, newspapers, booklets, brochures, pamphlets, circulars, bulletins, notices, forecasts, drawings, diagrams, instructions, minutes of all other communications of any type, including inter and intra-office communications, purchase orders, questionnaires, and surveys, charts, graphs, photographs, phonograph, tape or other recordings, punch cards, magnetic tapes, discs, data cells, drums, print-outs, all other data compilations from which information can be obtained (translated, if necessary, by defendants through detection devices into usable form), and any other writings or documents of whatever description or kind, including copies of any of the foregoing now in the possession, custody or control of you, your counsel, agents, employees, and any and all persons acting on your or their behalf.

When the word "documents" is used it also includes all copies of such documents.

2. If you withhold any document covered by this Request under claim of privilege, please furnish a list identifying each document for which the privilege is claimed, together with the following information: date, sender, recipient, persons to whom copies were furnished together with their job titles, subject matter, basis on which privilege is claimed and the paragraph of this Request to which such documents respond.

3. The time period covered by this Request, except where otherwise indicated is from the time of the formation of Pacific Homes or its predecessor up to and including the date of this Request.

4. As used herein, "UMC" means The United Methodist Church and its predecessor The Methodist Church; "CFA" means Council on Finance and Administration of the United

Methodist Church and its predecessor the Council on World Service and Finance; "PSWAC" means Pacific Southwest Annual Conference of The United Methodist Church and its predecessor the Southern California-Arizona Annual Conference of The United Methodist Church; "HWMD" means the Health and Welfare Ministries Division of the General Board of Global Ministries of The United Methodist Church and includes its predecessor the Methodist Board of Homes and Hospitals; "PMIF" means Pacific Methodist Investment Fund; "BOC" means the Board of Control Re: Pacific Homes Corporation; "MIF" means the Methodist Investment Fund which was administrated by the National Division of the Board of Missions and includes any and all successor funds or organizations to MIF such as the United Methodist Development Fund; "GBGM" means the General Board of Global Ministries of The United Methodist Church and includes any predecessor body to the GBGM such as The Board of Missions of the Methodist Church; "NAHWM" means the National Association of Health and Welfare Ministries of the United Methodist Church and includes any predecessor body to the NAHWM.

The documents requested are:

1. All documents relating to the affiliation, certification, and accreditation, of Pacific Homes, or any Home operated by Pacific Homes, by the HWMD, the Health and Welfare Ministries General Board of Global Ministries, or successors or predecessors of either or any unit of either performing a similar function.

2. All documents which relate in any way to:

a. The financial condition of Pacific Homes, or any Home operated by Pacific Homes.

b. The operations of Pacific Homes, or any Home operated by Pacific Homes.

c. The fee structure of Pacific Homes, or any Home operated by Pacific Homes.

d. The management of Pacific Homes, or any Home operated by Pacific Homes.

e. The relationship of Pacific Homes to PSWAC, PMIF, UMC or CFA.

3. All documents which relate in any way to:

a. The financial condition of PMIF.

b. The operations of PMIF.

c. The management of PMIF.

d. The relationship of PMIF to PSWAC, MIF, UMC or CFA.

4. All documents which relate in any way to:

a. The financial condition of PSWAC.

b. The operations of PSWAC.

c. The management of PSWAC.

5. All documents which relate in any way to:

a. The financial condition of UMC.

b. The operations of UMC.

c. The Management of UMC.

6. All documents which relate in any way to:

a. The financial condition of MIF.

b. The operations of MIF.

c. The management of MIF.

7. All documents (including pamphlets, books, releases, brochures, etc.) which explain, discuss or relate to the organization, structure, duties, function and work of:

a. HWMD

b. GBGM

c. PMIF

d. PSWAC

e. BOC

f. MIF

g. NAHWM

h. CFA

8. All documents (including pamphlets, books, releases, brochures, etc.) which explain, discuss or relate to the relationship between:

a. HWMD and UMC

b. HWMD and CFA

c. GBGM and UMC

d. GBGM and CFA

e. PMIF and PSWAC

f. PMIF and BOC

g. PMIF and Pacific Homes or any Home operated by Pacific Homes

h. MIF and UMC

i. MIF and CFA

j. MIF and GBGM

k. BOC and PSWAC

l. BOC and Pacific Homes or any Home operated by Pacific Homes

m. PSWAC and UMC

n. PSWAC and CFA

o. PSWAC and GBGM

p. PSWAC and Pacific Homes or any Home operated by Pacific Homes

q. NAHWM and Pacific Homes or any Home operated by Pacific Homes

r. NAHWM and UMC.

s. NAHWM and HWMD.

t. NAHWM and GBGM.

9. All copies of advertisements for Pacific Homes or any Home operated by Pacific Homes, all promotional and explanatory literature for Pacific Homes or any Home operated by Pacific Homes and all documents used for the solicitation of potential residents of Pacific Homes or any Home operated by Pacific Homes.

10. All documents and copies thereof that relate in any way to the drafting, designing, creating, printing, or distribution of advertisements or promotional and explanatory literature for Pacific Homes or any Home operated by Pacific Homes and all documents that relate to the source of funds used for the foregoing.

11. All documents that relate in any way to the drafting designing, creating, printing, or distribution of advertisements or promotional and explanatory literature for Homes sponsored by the UMC, Homes affiliated with or certified by the HWMD, Homes affiliated with or members of NAHWM.

12. All documents and copies thereof that relate in any way to the raising or attempts to raise, even if unsuccessful, of capital by Pacific Homes, or by the UMC, PMIF, CFA, MIF, or PSWAC, to fund or assist Pacific Homes, including but not limited to:

a. The obtaining of loans, borrowings, advances, or extensions of credit of any kind, whether secured or unsecured.

b. The sale of bonds, debentures, investment contracts, real property or securities of any kind whatsoever.

13. All correspondence between any officer, director, employee, agent, trustee, official, Bishop, Minister or any other representative of the UMC, Pacific Homes, CFA, HWMD, GBGM, PMIF, BOC, MIF, or PSWAC, and you or any officer, director, employee, agent, trustee, official or any other representative of your organization, relating in any way to Pacific Homes or any Home operated by Pacific Homes.

14. All correspondence from or to any third party* to or from any officer, director, employee, agent, trustee, official, Bishop, Minister or any other representative of the UMC, Pacific Homes, CFA, HWMD, GGM, PMIF, BOC, MIF, or PSWAC relating in any way to Pacific Homes or any Home operated by Pacific Homes.

15. All correspondence and copies thereof between third parties* that relate in any way to Pacific Homes or any Home operated by Pacific Homes.

16. All notes, memoranda or minutes of meetings or conversations that relate in any way to PMIF, BOC, Pacific Homes or any Home operated by Pacific Homes.

17. Copies of all tax returns or other documents filed by UMC, PSWAC, HWMD, GBGM, PMIF, MIF, or CFA with the United States Government, Department of Internal Revenue or any state or territory of the United States or any county or local subdivision in which any claim was made that the UMC, PSWAC, HWMD, GBGM, PMIF, MIF, or CFA was exempt from taxation.

18. All documents relating to the payment for advertisements for Pacific Homes or any Home operated by Pacific

* "Third Party" means any entity or person other than someone affiliated with the UMC, CFA, HWMD, GBGM, PMIF, BOC, MIF, PSWAC or Pacific Homes.

Homes appearing in any publication published by the Methodist Publishing House, its predecessors or successors, including but not limited to a publication entitled *Together*.

19. All documents which relate in any way to the status of Pacific Homes, PSWAC, UMC, HWMD, GBGM, PMIF, MIF, and the CFA as exempt from taxation, whether federal, state or local.

20. All documents that relate in any way to the operation of the BOC, including but not limited to minutes of BOC meetings, notes or memoranda of communications between officers, members, directors, agents, and employees of the BOC and you or your organization or any officer, director, employee, agent, trustee, official, or any other representative of Pacific Homes, or between the BOC, its agents, members, employees, officers, directors, and third parties, including but not limited to any defendants named in the above entitled action.

21. All documents that relate in any way to the 1954 Report or study prepared by Huggins & Co., including but not limited to the reports or copies of the reports themselves, correspondence between Huggins & Co. and Pacific Homes, UMC, CFA, HWMD, GBGM, PSWAC or any other third party, any documents used to prepare the report or study.

22. All documents that relate in any way to the sale by PMIF of $5 million principal amount of 7%-8½% collateral trust bonds, including but not limited to all copies of the offering circulars, and all documents evidencing communications by or between Pacific Homes, PMIF, BOC, PSWAC, UMC, CFA, MIF, HWMD, GBGM, any federal or state securities agencies, the Securities and Exchange Commission, the Wisconsin Commissioner of Securities, or the California Corporations Commissioner, Chapman & Cutler,

Francoeur and Company, Musick, Peeler & Garrett, Roland Maxwell, Coopers and Lybrand and all documents evidencing communication between said entities and any third parties. All documents that relate in any way to Pacific Homes or any Home operated by Pacific Homes, accommodation fees, commissions, debt service or projected cash flow created or obtained in connection with the $5 million bond offering of PMIF and all documents that relate to any investigation made of Pacific Homes in connection with the $5 million bond offering by PMIF.

23. All documents published or distributed by Pacific Homes or any Home operated by Pacific Homes, to residents or potential residents, employees, agents, regulatory authorities, administrative authorities, tax authorities or any other third parties or entities.

24. All documents which relate in any way to the establishment, operation or financial condition of hospitals or retirement homes affiliated with, certified by or sponsored by:

a. HWMD;

b. GBGM;

c. The Methodist Board of Homes and Hospitals;

d. The UMC; and

e. PSWAC;

25. All documents in your possession, custody or control relating in any way to the membership of Pacific Homes, or any Home operated by Pacific Homes, the composition of the Board of Directors of Pacific Homes, the management of Pacific Homes, the operation of Pacific Homes, its by-laws, articles of incorporation, financial statements, advertisements of Pacific Homes and any other documents mentioning or discussing Pacific Homes or any Home operated by Pacific Homes.

26. All documents that relate in any way to the Elmer Fox Westheimer & Company Report entitled Council on Finance and Administration, Southern California-Arizona Annual Conference of the United Methodist Church—Operations Review and Organization Study of Pacific Homes—June 4, 1974, including but not limited to all copies of the Report, correspondence, financial statements, inter-office memoranda, documents furnished or provided to Elmer Fox Westheimer & Company.

27. All documents that relate in any way to the Cresup, McCormack and Paget study, including but not limited to documents furnished or provided to the individuals or entities who made this study and communications between the individuals or entities who made this study and Pacific Homes, UMC, HWMD, GBGM, CFA, PSWAC, and any third parties.

28. All documents that relate in any way to other reports or studies made or conducted concerning the operation, management, or financial condition of Pacific Homes or any Home operated by Pacific Homes.

29. All documents which relate in any way to the payment or transfer of money or any asset or thing of value by Pacific Homes or any Home operated by Pacific Homes to the UMC, PSWAC, HWMD, GBGM, PMIF or the CFA for any purpose.

30. All documents which relate in any way to providing care or a residence by Pacific Homes or any Home operated by Pacific Homes to any present or former employee of the PSWAC (or any subordinate body thereof), UMC (or any subordinate body thereof) or the CFA (including any Methodist minister) or dependent, widow or child of such person.

31. All documents which relate to the income or assets of, or income or assets under the control of, the PSWAC, UMC, HWMD, GBGM, PMIF, MIF, or the CFA including, but not limited to investments, cash, real property, general church funds, donations, gifts or bequests for the time period January 1, 1974 to the present.

32. All documents which relate in any way to information provided by you to Methodist Churches, agencies or ministers relating to Pacific Homes or any Home operated by Pacific Homes or any retirement or hospital facility affiliated with the Methodist Board of Homes and Hospitals (or any predecessor or successor entity) including all such documents that indicate that any money, credit or other thing of value was to be provided to any person or entity in return for referring any person to Pacific Homes or any of its Homes or any other retirement facility affiliated with the Methodist Board of Homes and Hospitals.

33. All documents which relate in any way to:

(a) All mergers or unions of religious organizations which resulted in the present United Methodist Church, including but not limited to the 1939 combination of the Methodist Episcopal Church, the Methodist Protestant Church and the Methodist Episcopal Church, South and the 1968 union of the Methodist Church and the Evangelical United Brethren Church;

(b) Titles to property in the name of the United Methodist Church or predecessor churches including those where the title is held in trust for the UMC;

(c) The operations of the Methodist Board of Homes and Hospitals;

(d) The operations of the HWMD;

(e) Meetings of the Council of Bishops and communications between any member Bishop and any other person relating to the temporal affairs of the church;

(f) Any jurisdictional conferences of the Western conferences;

(g) The operations and the meetings of the BOC, PMIF (and its Board), PSWAC, the PSWAC Council on Finance and Administration and the PSWAC conference Board of Pensions;

(h) The operations of the Methodist Churches' superintending offices;

(i) The operations and meetings of the PSWAC Cabinet;

(j) The operations and meetings of the General Conference;

(k) Contractual agreements between the UMC and any affiliated autonomous church;

(l) The operations and meetings of the CFA including its Executive Committee as they relate to the duties set forth in §§ 906 and 907 of the Book of Discipline;

(m) The use of the word "Methodist" by any corporation or other business unit;

(n) The Methodist Corporation;

(o) The holding of any property by any local church, charge, or agency or institution of church in trust for the UMC; and

(p) The receipt and disbursement of general church funds.

34. All proposed, suggested, and actual advertising sales or promotional materials prepared by or on behalf of the Methodist Board of Homes and Hospitals or the HWMD which relate to Homes or Hospitals affiliated in any way with the HWMD, the UMC or any of its institutions or agencies and all documents relating to the use and distribution of said material.

35. Copies of every document in your possession or under your control which bear the name "Methodist Church" or "United Methodist Church" including the following:

a. Contracts;

b. Bank account statements;

c. Letterhead;

d. Leases;

e. Checks, cancelled or otherwise;

f. Any filing with any governmental entity;

g. Correspondence signed or written by any person on behalf of the UMC; and

h. Any will, trust or similar instrument.

36. All documents relating to the sale of life care contracts, pre-paid continuing care fee, pre-paid lifetime care fees, or accommodation fees by any Home affiliated with or certified by the HWMD.

37. All documents distributed generally to Homes affiliated with or certified by the HWMD that were, or would have been, in the ordinary course of business, distributed to Pacific Homes or any home operated by Pacific Homes.

38. All prospectuses, offering circulars or similar sales documents relating to the sale of securities by:

a. Homes or Hospitals affiliated with or certified by the HWMD;

b. Institutions sponsored by, related to, or affiliated with the UMC.

39. All Annual or other periodic reports of PSWAC, HWMD, PMIF, BOC, MIF, and GBGM.

40. All annual reports or other periodic reports of NAHWM.

41. All communications between NAHWM and Pacific Homes or any Home operated by Pacific Homes.

42. All communications between NAHWM and HWMD, GBGM, PSWAC, CFA, UMC that relate to Pacific Homes or any Home operated by Pacific Homes.

43. All documents relating to any borrowing, or sale of securities, by Pacific Homes from or to Connecticut General Life Insurance Company.

DATED: August 17, 1978

MILBERG WEISS BERSHAD &
SPECTHRIE

By:
FREDERIC J. MILBERG

1720 Central Federal Tower
225 Broadway
San Diego, California 92101
Attorneys for Plaintiffs

OF COUNSEL:

WIED, GRANBY & ALFORD, A P.C.
COLIN W. WIED
DAVID J. YARDLEY

APPENDIX E

THE UNITED METHODIST CHURCH
Judicial Council

PRESIDENT
TOM MATHENY
P.O. Box 221
Hammond, Louisiana 70401

VICE PRESIDENT
TRUMAN W. POTTER
919 Chappell Road
Charleston, W. Va. 25304

SECRETARY
HOOVER RUPERT
212 South Park Street
Kalamazoo, Michigan 49006

As Secretary of the Judicial Council of the United Methodist Church, I certify that the following decision was rendered by the Council in session May 25, 1979 in Chicago, Illinois:

IN RE: AUTHORITY OF THE GENERAL COUNCIL ON FINANCE AND ADMINISTRATION TO REPRESENT THE UNITED METHODIST CHURCH IN LITIGATION.

DECISION: Paragraph 907.4 of the *1976 Discipline* does not delegate to the General Council on Administration and Finance either the authority or the duty to sue, or to file an answer or to otherwise plead, on behalf of the United Methodist Church as a denomination.

This is Decision No. 458 of the Judicial Council, and is dated in our records, May 25, 1979.

DR. HOOVER RUPERT
Secretary, The Judicial Council
The United Methodist Church

Certified, May 29, 1979.
Kalamazoo, Michigan

78-1855

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 1855

PAUL W. MILHOUSE and EWING T. WAYLAND, Being Those Persons upon Whom Service of Process Was Attempted on Behalf of THE UNITED METHODIST CHURCH, a Named Defendant in the Underlying Action,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent,

AND

CHARLES W. TRIGG, et al.,

Real Parties in Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MILBERG WEISS BERSHAD & SPECTHRIE
By: WILLIAM S. LERACH
GREGG A. JOHNSON
1720 Central Federal Tower
225 Broadway
San Diego, California 92101
Telephone: (714) 231-1058
WIED GRANBY ALFORD & ARKIN
By: COLIN W. WIED
DAVID J. YARDLEY
1260 Bank of California Plaza
110 West A Street
San Diego, California 92101
Telephone: (714) 231-8700
Attorneys for Real Parties in Interest

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Miscellaneous

IN THE

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No. 1855

PAUL W. MILHOUSE and EWING T. WAYLAND, Being Those Persons upon Whom Service of Process Was Attempted on Behalf of THE UNITED METHODIST CHURCH, a Named Defendant in the Underlying Action,

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UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent,

AND

CHARLES W. TRIGG, et al.,

Real Parties in Interest.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Real Parties in Interest, Charles W. Trigg, et al., respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Order of the Ninth Circuit Court of Appeals denying Petitioners' Petition for Writ of Mandamus to review the interlocutory decision of the United States District Court for the Southern District of California denying Petitioners' Motion to Dismiss the action against the United Methodist Church.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is a hierarchical or connectional religious denomination, which is organized and governed pursuant to a constitution, by-

laws, and rules of operation providing a comprehensive system of church government, including a supreme legislative body, a central treasury, and a Council of Bishops in charge of its temporal and spiritual affairs, and which operates through a nationwide structure of local churches, annual conferences and missional agencies, suable as an unincorporated association under Rule 17(b) of the Federal Rules of Civil Procedure?

2. Does a civil action against an unincorporated association for violation of the federal securities laws violate the due process rights of individual members and constituent units of the association neither named nor served when federal law prohibits satisfaction of a judgment against an unincorporated association from the individual assets of unnamed and unserved members of the association?

3. May a court in a civil action by private citizens seeking damages for wrongful secular conduct consisting of violations of the federal securities laws rule that a religious organization is suable as an unincorporated association under federal law without violating the constitutional guarantee of religious freedom when the religious organization's witnesses opine it is not so suable?

STATEMENT OF THE CASE

A. *Factual Background.*

Plaintiffs' complaint ("Complaint") alleges violations of the federal securities laws in connection with the sale of $5 million principal amount of Collateral Trust Bonds ("Bonds") to obtain funds for Pacific Homes, a non-profit corporation operating several retirement facilities in California, Arizona and Hawaii. Ex. No. 1 to Affidavit of William S. Lerach dated June 30, 1978

("Lerach Affidavit").[1] Named as defendants are The United Methodist Church ("UMC"), Pacific Methodist Investment Fund ("PMIF"), The General Council on Finance and Administration of the United Methodist Church ("GCFA"), The Pacific and Southwest Annual Conference of the United Methodist Church ("PSWAC), Francoeur & Co., and a number of directors or officers of PMIF, PSWAC or Pacific Homes.

The Complaint alleges that Pacific Homes was the agency, alter ego and was under the control and domination of UMC, GCFA, PSWAC, and PMIF (collectiveiy referred to as the "Church Defendants"). Complaint ¶¶ 3, 4, 5. The Complaint alleges that the defendants knowingly employed devices, schemes and artifices to defraud in connection with sale of the Bonds, including twenty specified false and misleading statements or omissions in prospectuses and other sales literature. Complaint ¶ 9.[2]

Pacific Homes sold life care contracts whereby in return for a lump sum payment it promised to provide shelter, food, medical and nursing care at no additional cost for the remainder of a resident's life. Pacific Homes, however, used the money obtained from the sale of prepaid life care contracts to build new

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[1] This Affidavit authenticates some 74 exhibits including The Book of Discipline of the United Methodist Church ("BOD/UMC") (1976 ed.) which comprise substantially all of the evidence upon which Plaintiffs' predicated their factual showing that UMC was an unincorporated association.

[2] On August 15, 1978, the District Court denied the motions of the Church Defendants to dismiss the Complaint for failure to state a claim upon which relief could be granted, for failure to plead fraud with the required particularity, for improper venue and for a more definite statement (with one exception not here relevant).

facilities and to make speculative real estate investments, instead of setting it aside in liquid investments to provide funds for resident care in future years. The real estate investments went sour, Pacific Homes found it increasingly difficult to sell new life care contracts, and the corporation's financial condition deteriorated. Lerach Affidavit, Ex. Nos. 57-59. By the late 1960's Pacific Homes was in financial difficulty. Lerach Affidavit, Ex. Nos. 20-26.

In March 1968, Bishop Kennedy (UMC's Bishop in charge of PSWAC and a member of both the Board of Directors of Pacific Homes and UMC's Council of Bishops) was specifically informed of Pacific Homes' financial situation by defendant Francoeur who advised the Bishop that the situation must be kept secret in order to continue to sell life contracts:

> Fortunately for Pacific Homes at this point, the financial position of the Corporation is not widely known for, if the seriousness were generally known, Pacific Homes would have additional problems from the standpoint of attracting residents. . . .
>
> . . . .
>
> Please bear in mind that if adverse publicity comes to light it would be difficult, if not impossible, to sell the accommodations each year, and, therefore, we feel that the situation must be rectified immediately. For the church's sake alone these problems must be resolved for, even if the Methodist Church is not legally responsible in this instance and even if a moral obligation were not assumed, the damage that would be done to the reputation and credit of the Methodist Church would be of tremendous magnitude.

Lerach Affidavit, Ex. No. 59 at 3, 6.

To raise capital during this period of financial deterioration, Pacific Homes commenced a "Conversion Financing Plan," which included obtaining $5,000,000 through the public sale of

bonds to the plaintiff class.[3] Despite this additional capital Pacific Homes' financial position continued to deteriorate, and in 1977 Pacific Homes entered bankruptcy proceedings. On April 27, 1978, the Bonds were declared in default. Lerach Affidavit, Ex. No. 27.

B. *The Proceedings Below.*

On August 15, 1978, the District Court denied UMC's motion to dismiss the action as to UMC and refused to certify its ruling for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). UMC sought an emergency stay from the Ninth Circuit pending the filing of a Petition for Mandamus, which the Ninth Circuit denied on September 14, 1978, stating:

> In order to allow this Court to consider the merits of petitioners' emergency motion for stay pending filing of petition for writ of mandamus, the emergency motion is treated as a petition for writ of mandamus in its own right and is hereby denied.

Appendix Ex. No. A. UMC thereafter filed a Petition for Mandamus which the Ninth Circuit denied on March 13, 1979. It is this Order that Petitioners seek to have this Court review.

On September 15, 1978, a default was entered against UMC for failure to answer within the time allowed by law. On January 8, 1979, the District Court certified this action as a class action on behalf of the Bond purchasers. On July 16, 1979, the District Court denied UMC's motion to set aside the default, and set plaintiffs' motion for entry of final judgment against the defaulting defendant, UMC, for hearing on October 30, 1979, which if granted will result in an appealable judgment.

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[3] The Bonds were sold to the public by PMIF who used the proceeds to purchase bonds issued by Pacific Homes, thus generating capital for Pacific Homes. Lerach Affidavit, Ex. Nos. 60-63.

C. *Related Matters in This Court.*

Petitioners admit that the "essential issues raised" in their Petition for Writ of Certiorari will also be presented in a Petition to be filed by them in a companion state court litigation, *Barr v. United Methodist Church,* 90 Cal.App.3d 259, ... Cal. Rptr. ..... (1979). UMC Petition at 4. *Barr* is a class action on behalf of the residents of Pacific Homes seeking specific performance of the residents' life care contracts, or damages for breach of contract, fraud and statutory violations.

On March 8, 1979, the California Court of Appeal unanimously held that:

a) UMC is a hierarchical religious organization suable as an unincorporated association under California law (90 Cal.App.3d at 263-272);

b) Due process considerations do not bar an action for fraud, breach of contract and statutory violations against UMC (*Id.* at 272-273); and,

c) The constitutional guarantee of freedom of religion does not bar an action for fraud, breach of contract and statutory violations against UMC by private citizens complaining of wrongful secular conduct (*Id.* at 273-276).[4]

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[4] The California Superior Court previously ruled that GCFA operated as "the central treasury and fiscal agent of the United Methodist Church," received and collected UMC's "general church funds" amounting to over $60 million in 1976, of which "many millions" came from California, "controls the purse-strings of the United Methodist Church and dominates all church activities in the nation." The California appellate courts refused to disturb that ruling. GCFA filed a Petition for Writ of Certiorari and sought a stay from Mr. Justice Rehnquist. Mr. Justice Rehn-

(This footnote is continued on next page)

On May 17, 1979, the California Supreme Court, without dissent, denied UMC's Petition for Hearing. UMC thereafter sought a stay of the *Barr* action from Mr. Justice Rehnquist pending this Court's action on its Petition for Writ. *Barr, et al. v. The United Methodist Church, et al.,* No. A-1084. On June 26, 1979, Mr. Justice Rehnquist denied the requested stay. UMC then applied to Mr. Justice Brennan for a stay. On June 27, 1979, Mr. Justice Brennan referred UMC's renewed stay application to the entire Court, which denied the stay, Mr. Justice White and Mr. Justice Blackmun taking no part in the consideration or decision of the application.

ARGUMENT

I.

UMC DOES NOT ATTEMPT TO MEET THE REQUIRED STANDARD FOR GRANTING OF MANDAMUS

UMC asks this Court to review the Ninth Circuit's denial of its Petition for Mandamus, but nowhere in its Petition for Certiorari does UMC attempt to demonstrate that it meets the standards required to obtain mandamus.

Only exceptional circumstances justify the extraordinary relief of mandamus. *Kerr v. United States District Court,* 426 U.S. 394, 402-403 (1976); *Will v. United States,* 389 U.S. 90, 95 (1967). Petitioners have the heavy burden of showing that they are *clearly and indisputably* entitled to such relief. *Kerr v. United*

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quist denied the stay and thereafter the full Court denied GCFA's petition. *General Council on Finance and Administration of The United Methodist Church v. Superior Court,* ..... U.S. ....., 99 S.Ct. 35 (1978) (Rehnquist, J., in chambers), *cert. denied,* ..... U.S. ....., 99 S.Ct. 281 (1978).

States District Court, supra at 403; *Will v. United States, supra* at 96; *Bankers Life & Casualty Company v. Holland,* 346 U.S. 379, 389 (1953). Writs of mandamus are available only in unusual circumstances where a lower court's action amounts to a "usurpation of power." *Kerr v. United States District Court, supra* at 402. "As extraordinary remedies, they are reserved for really extraordinary causes," *Ex parte Fahey,* 332 U.S. 258, 260 (1947), and their use is always discretionary with the issuing court. *Kerr v. United States District Court, supra* at 403.

The Petition should be denied because Petitioners have not even attempted to demonstrate that Petitioners are entitled to relief by way of mandamus. Moreover, what Petitioners seek through the appeal of the denial of mandamus is this Court's review of a determination by the trial court as to whether UMC is structured, organized and operating as an unincorporated association.

II.

PETITIONERS LACK STANDING

Petitioners seek relief for a named defendant, the United Methodist Church. However, the Petitioners are not UMC, but rather three individual officials of UMC who specifically disclaim any power or authority to speak for UMC. UMC Petition at 6. According to their Petition, the action they request this Court to take is neither for their benefit nor the benefit of someone they represent. If Petitioners' version of their status is accepted, they lack standing to petition this Court because they are not aggrieved. They also lack standing to raise the constitutional rights of individuals or entities not before the Court.

A. *Petitioners' Disclaimer of Representative Status Deprives Them of Standing to Argue UMC's Position.*

Petitioners state that they cannot speak or act for the whole church.[5] *Id.* Neither of these persons has been named as an individual defendant in this action. Given this disclaimer of repre-

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[5] UMC asserts that it was not properly served because those persons served by Plaintiffs "personally had no authority to receive service of process for the entire denomination." UMC Petition at 6. This argument is no more than the mirror image of its "UMC is not a jural entity" argument. If UMC is an unincorporated association, it follows that service on the organization can be accomplished in accordance with the rules generally applicable to service on unincorporated associations set forth in Federal Rule of Civil Procedure 4(d)(3).

The summons and complaint in this action were served upon Ewing T. Wayland, General Secretary and Treasurer of GCFA and Treasurer of UMC. GCFA is directed by Paragraph 907(4) of BOD/UMC to protect UMC's legal interests. Paul W. Milhouse, a Bishop of UMC and then President of UMC's Council of Bishops, was also served. Bishops of UMC are each "general superintendents of the whole Church." BOD/UMC ¶ 50 at 34-35; Glossary at 602; ¶ 525 at 227. Hence, the individuals served were authorized to receive service on behalf of UMC. Fed. R. Civ. P.4(d)(3). *See Georgia v. National Democratic Party,* 447 F.2d 1271, 1273 n.2 (D.C. Cir.), *cert. denied,* 404 U.S. 858 (1971.)

The authority of Petitioners to receive service of process cannot be negated by UMC's stating they are not so authorized. *See Price v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers,* 46 F.R.D. 18, 21 (E.D. Pa. 1969); *cf. Boyd v. Grant Trunk Western R. Co.,* 338 U.S. 263, 265-266 (1949); *Home Ins. Co. of New York v. Morse,* 87 U.S. (20 Wall.) 445, 451 (1874).

The due process purpose of assuring UMC fair notice and providing an opportunity to be heard has been well satisfied here. Service is sufficient if made upon an individual in a relationship with the organization that makes it fair to imply authority on his

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sentative status, Petitioners have no personal stake in the litigation's outcome.

Petitioners as individuals cannot show that they will be benefited in a concretely demonstrable way from a decision holding that UMC is not suable as a jural entity. *See Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38 (1976); *Warth v. Seidin,* 422 U.S. 490, 503-507 (1975).

The applicable test for standing here is that Petitioners must show a particularized injury to themselves caused by Plaintiffs' conduct that is substantially likely to be redressed by the relief sought. *Duke Power Company v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 75 n.20 (1978). Petitioners do not meet this test. They cannot show that their position will be altered in any way by obtaining the remedy they seek. Reversing the District Court would not restore to Petitioners any rights of which they are now deprived. Petitioners themselves are in exactly the same position after the decision they question here as they were before it. *Cf. Zablocki v. Redhail,* ..... U.S. ....., 98 S.Ct. 673, 678 n. 6 (1978). They have failed to demonstrate the constitutional element of standing that an injury to themselves is likely to be redressed by a decision in their favor. *Regents of University of California v. Bakke,* ..... U.S. ....., 98 S.Ct. 2733, 2743-44 n. 14 (1978).

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part to receive service. *American Football League v. National Football League,* 27 F.R.D. 264, 268 (D.Md. 1961); *cf. International Shoe Company v. Washington,* 326 U.S. 310, 320 (1945). Executive officers of UMC were served and that service provided due process notice. *Diapulse Corp. v. Birtcher Corp.,* 362 F.2d 736, 741 (2d Cir.), *cert. dismissed,* 385 U.S. 801 (1966); *Operative Plasterers' & Cement Finishers' International Association v. Case,* 93 F.2d 56, 65-68 (D.C. Cir. 1937); *Canuel v. Oskoian,* 23 F.R.D. 307, 312 (D.R.I.), *aff'd,* 269 F.2d 311 (1st Cir. 1959).

B. *Petitioners Lack Standing To Assert The Constitutional Rights of Others Not Before The Court.*

Ordinarily a litigant has standing to seek redress for injury done to him, but not to others. *E.g., Singleton v. Wulff,* 428 U.S. 106, 123-124 (1976) (Powell, J., concurring in part and dissenting in part); *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 166-168 (1972); *Tileston v. Ullman,* 318 U.S. 44, 46 (1943); *United States v. Fury,* 554 F.2d 522, 525-526 (2d Cir. 1977), *cert denied,* 433 U.S. 910 (1978). Petitioners challenge the District Court's decision on due process grounds claiming that Plaintiffs seek to sue all Methodists. As a threshold matter, Petitioners have no standing to assert the due process rights of either these individuals or UMC.

Petitioners have structured their argument in a manner that undercuts the prudential element of *jus tertii* standing and that places them in a position analogous to that of the Sierra Club in *Sierra Club v. Morton,* 405 U.S. 727 (1972). There, Sierra Club did not rely on injury to its members in order to show standing. Instead, it argued that it should be accorded standing based solely on its expertise in environmental matters. *Id.* at 735 n. 8, 739-741. Petitioners here attempt the same ploy by eschewing representation of anyone other than themselves yet arguing the due process rights of organizations and individuals not named, not served and not in any way threatened by this action.

III.

THE DISTRICT COURT'S DECISION FINDING UMC SUABLE AS AN UNINCORPORATED ASSOCIATION WAS LEGALLY AND FACTUALLY CORRECT AND CONSTITUTIONALLY SOUND

As evident from a reading of the issues framed in UMC's Petition, UMC's argument proceeds from the essential premise that UMC has no officers, executive board or other decision making mechanism and no assets. UMC attempts to induce this Court to act under the belief that this premise is true by suggesting that the District Court decided that "any aggregation of individuals promoting a common objective under a common name is an 'unincorporated association.' " UMC Petition at 15.

The District Court fully considered and examined the substantial evidential record and correctly decided that UMC is an unincorporated association because it is organized and governed pursuant to a constitution, by-laws and rules of operation providing a comprehensive system of church government including a supreme legislative body, a central treasury (GCFA) and a Council of Bishops in charge of its temporal and spiritual affairs.

UMC asks this Court to disregard the substantial evidence in the record concerning the organization, structure and operation of UMC which leads to a result contrary to its wishes. Moreover, UMC would require this Court to ignore years of established case law to the effect that UMC is a hierarchical religious association, including the recently decided case of *Jones v. Wolf*, 47 U.S.L.W. 4962 (July 2, 1979) which specifically refers to UMC as a hierarchical association. Moreover, *Jones v. Wolf* cited and quoted with approval the Georgia Supreme Court's decision in *Carnes v. Smith*, 236 Ga. 30, 222 S.E.2d 322, *cert. denied*, 429 U.S. 322 (1976) which expressly recognized that UMC is "a hierarchical religious association" and that a local UMC church is "part of the whole body of the general church and is subject to the higher authority of the organization and its law and regulations." *Id.* at 38 (quoted in *Jones v. Wolf, supra*, 47 U.S.L.W. at 4965).

UMC does not directly contend, although the suggestion is clear, that this Court or other civil courts must adopt the opinions of its witnesses. *See* UMC Petition at 20, 29 n. 15. It simply finesses the matter by phrasing the issues as though those opinions are the "facts" of the case. The real issue in this case remains unchanged: can the civil courts rule, as the District Court did here, that UMC can be sued by private citizens for wrongful secular conduct even though UMC's witnesses' opine that it cannot be sued.

Because UMC challenges the determinations of the District Court concerning the organization, structure and operation of UMC, stating that "there is no factual basis for any conclusion that the denomination operates with a centralized structure or authoritarian polity" (UMC Petition at 21), Plaintiffs first present a small portion of the extensive record together with a discussion of the applicable law supporting the decision below. Plaintiffs then briefly discuss why there are no constitutional issues raised by UMC's Petition.

A. *Suits Against Unincorporated Associations Generally.*

Pursuant to Rule 17(b) of the Federal Rules of Civil Procedure, Plaintiffs have sued UMC as an unincorporated association for the "purpose of enforcing for or against it a substantive right existing under . . . the laws of the United States."

Permitting suits against unincorporated associations correctly recognizes the important role such organizations play in modern society. Society values unincorporated associations' activities and assures their success by allowing them to sue, but society also protects individual rights by making unincorporated associations amenable to suit.

> [I]nasmuch as a fictional entity has been recognized by the law for the purpose of benefiting and protecting unincorporated associations in both the substantive and adjective senses, as by protection against embezzlement of funds, by giving right to appear in statutory arbitrations and before official boards, and, more recently, by giving rights to represent workers in collective bargaining, *so also the fictional entity must in common fairness be recognized for the protection of those dealing with such associations and claiming that in such dealing their legal rights have been violated.*

Operative Plasterers' & Cement Finishers' International Association v. Case, supra 93 F.2d at 64-65 (emphasis added, footnote omitted). *See also Barr v. UMC, supra,* 90 Cal.App.3d at 264-267.

Plaintiffs dealt with UMC as an association. They purchased Bonds sold by PMIF, "a subordinate body of the Southern California-Arizona Annual Conference," (Lerach Affidavit, Ex. Nos. 60-63) for the express purpose of financing an organization "sponsored by The United Methodist Church" (Lerach Affidavit, Ex. Nos. 48, 60 at 750, 61 at 757, 62 at 764, and 63 at 771), held out as an "agency of The United Methodist Church" (Lerach Affidavit, Ex. Nos. 1 at 3, 17 at 256, 47), and identified in UMC publications as affiliated with and certified by UMC, and thus "entitle[d] to identify itself as an agency of The United Methodist Church." Lerach Affidavit, Ex. No. 19 at 31.

Courts, federal and state, have consistently permitted suits

by and against diverse types of groups, including religious groups, as unincorporated associations. *Alyeska Pipeline Service Company v. Wilderness Society,* 421 U.S. 240 (1975) (Environmental Societies); *Schlesinger v. Reservists Committee To Stop the War,* 418 U.S. 208 (1974) (Organization of Veterans); *Moose Lodge No. 107 v. Irvis, supra* (Social Clan); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969) (Church); *United Mine Workers v. Coronado Coal Company,* 259 U.S. 344 (1922) (Labor Unions); *Ripon Society v. National Republican Party,* 525 F.2d 567 (D.C. Cir. 1975), *cert. denied,* 424 U.S. 933 (1976) (National Republican Party); *Georgia v. National Democratic Party,* 447 F.2d 1271 (D.C. Cir.), *cert. denied,* 404 U.S. 858 (1971) (National Republican Party); *Friends of Mammoth v. Board of Supervisors,* 8 Cal.3d 247, 502 P.2d 1049, 104 Cal.Rptr. 761 (1972) (Environmental Societies); *Daniels v. Sanitarium Association, Inc.,* 59 Cal.2d 602, 381 P.2d 652, 30 Cal.Rptr. 828 (1963) (Labor Union); *Marshall v. I. L. & W. Union,* 57 Cal.2d 781, 371 P.2d 987, 22 Cal.Rptr. 211 (1962) (Labor Union); *Jardine v. Superior Court,* 213 Cal. 301, 2 P.2d 756 (1931) (Stock Exchange); *California State University v. National Collegiate Athletic Association,* 47 Cal.App.3d 533, 121 Cal.Rptr. 85 (1975) (Athletic Organization); *White v. Cox,* 17 Cal.App.3d 824, 95 Cal.Rptr. 259 (1971) (Condominium Owners); *Juneau Spruce Corp. v. I. L. & W. Union,* 119 Cal.App.2d 144, 259 P.2d 23 (1953) (Labor Union); and *Herald v. Glendale Lodge,* 46 Cal.App. 325, 189 P.329 (1920) (Lodge).

Moreover, UMC *itself* has heretofore been sued as a defendant, *United Methodist Church v. St. Louis Crossing Independent Methodist Church,* 150 Ind. App. 574, 276 N.E.2d 916 (1971), and it has sued as a plaintiff, *The United Methodist*

Church v. Sparrow, Civil No. 6881 (Superior Court of Dooly Co., Georgia 1976).

Capacity to sue or be sued is determined by federal common law where, as here, federal rights are asserted. *Associated Students of University of California v. Kleindienst,* 60 F.R.D. 65, 67 (C.D. Cal. 1973); *National Association For Community Development v. Hodgson,* 356 F.Supp. 1399, 1402 (D.D.C. 1973); *Klebanow v. New York Produce Exchange,* 344 F.2d 294, 299 (2d Cir. 1965); *Action Alliance for Senior Citizens of Greater Philadelphia v. Shapp,* 400 F.Supp. 1208, 1212 (E.D. Pa. 1975); *United Industrial Corporation v. Nuclear Corporation of America,* 237 F.Supp. 971, 977 (D. Del. 1964); *Feldberg v. O'Connell,* 338 F.Supp. 744, 746 (D. Mass. 1972).

In *Georgia v. National Democratic Party,* 447 F.2d 1271 (D.C. Cir.), *cert. denied,* 404 U.S. 858 (1971), the National Republican Party, contended that it was not an unincorporated association and was therefore improperly named as a defendant. Georgia proffered evidence in the form of the Party's rules and by-laws, membership solicitation forms taken from the Party's magazine, a 1969 Party Membership Card, and, among other things, a cancelled check made payable to the Republican Party. The Court of Appeals found that Georgia's evidence was "persuasive" and that the National Republican Party was properly named. 447 F.2d at 1273, n.2.[6]

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[6] As demonstrated in Section III.B., *infra,* Plaintiffs offered abundant evidence of the hierarchical structure of UMC, including the *BOD/UMC* as well as other evidence. This Court recognized in *Jones v. Wolf, supra,* the importance of the *BOD/UMC* in establishing the structure of UMC, including certain trust provisions of *BOD/UMC* crucial to the maintenance of ownership and control by UMC over local church property. The District

(This footnote is continued on next page)

B. *UMC As An Unincorporated Association.*[7]

1. *Overview*

UMC is organized, exists and operates pursuant to the *BOD/UMC*

which is the official published statement (revised quadrennially to reflect actions of the General Conference) of the Constitution and laws of The United Methodist Church, its rules

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Court likewise, recognized the importance of the *BOD/UMC* to the organization and specifically referred to the trust clause provision in its oral opinion. Petitioners' Appendix C at A-10. In addition to the *BOD/UMC,* other evidence demonstrates UMC's structure as an unincorporated association. UMC has membership cards. Leiffer Deposition at 47. Plaintiffs produced a recently cancelled check made payable to UMC. Lerach Affidavit, Exhibit No. 32. The check was sent with a letter addressed to the "United Methodist Church, 1200 Davis Street, Evanston, Illinois 60201." Lerach Affidavit, Exhibit No. 33. The letter said: "I am sending my check for $10.00 to further the work of the United Methodist Church." The check was cashed by UMC, endorsed by UMC's treasurer (the GCFA), and a receipt from the GCFA was returned to the sender of the letter. Lerach Affidavit, Exhibit No. 34. Thereafter, GCFA forwarded the money to the General Council on Ministries of UMC which applied the funds to a "missional priority" designated as "Hunger." Lerach Affidavit, Exhibit No. 72. Dr. Murray H. Leiffer (upon whose affidavit UMC relied to support its proposition that UMC is not an unincorporated association) opined that it "would be impossible" to write a check to UMC; that no one would have authority to cash a check payable to UMC; and that he knew of no vehicle that exists to take monies written to UMC, cash and process them. Leiffer Deposition at 46-47.

[7] UMC suggests that its mere size exempts it from suit as an unincorporated association. Size does not prevent a group from being treated as an unincorporated association. Indeed, it was the size of unincorporated groups that first gave rise to the entity theory of associational law permitting suits against associations per se to avoid the inconvenience, expense and delay of suing the

(This footnote is continued on next page)

of organization and procedure, and a description of administrative agencies and their functions.

BOD/UMC Glossary at 601. *See also Jones v. Wolf, supra* 47 U.S.L.W. at 4963. The *BOD/UMC* states: "The United Methodist Church has become the *legal and ecclesiastical successor* to all property, property rights, powers, and privileges of The Evangelical United Brethren Church and The Methodist Church . . . ." *BOD/UMC* ¶ 819 at 328 (emphasis added); *see also BOD/UMC* ¶ 1 at 20 ("legal successor of the two uniting churches").

UMC is capable of owning and owns property. *BOD/UMC,* ¶ 6 at 21. UMC is a party to contracts. *BOD/UMC,* ¶ 670-671 at 253.[8] UMC is one of the named insureds and a party to a contract of insurance providing comprehensive general liability insurance with coverages in excess of $1,000,000,000. This contract states that the business of the "named insured" is to be a "religious organization." Lerach Affidavit, Ex. No. 29 at A2737. UMC has employees. *BOD/UMC,* ¶ 1701 at 485.[9] UMC owns and/or controls schools, hospitals and homes. *BOD/UMC,* ¶ 2445 at 557.

members and units of the association. *See Jardine v. Superior Court, supra* 213 Cal. at 307-308. In *United Mine Workers v. Coronado Coal Co.,* 259 U.S. 344 (1922), this Court noted:

> It would be unfortunate if an organization . . . in directing the conduct of 400,000 members . . . out of which so much unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in the course of such strikes. To remand persons injured to a suit against each of the 400,000 members, to recover damages and to levy on his share of the strike fund, would be to leave them remediless.

259 U.S. at 388-389.

[8] Moreover, the *BOD/UMC* is a contract between the parent denomination and its members. *Western Pennsylvania Conference of the United Methodist Church v. Everson Evangelical Church of North America,* 312 A.2d 35, 38 (Pa. 1973).

2. *The Structure Of The Church*

a. *The General Conference*

The supreme body of UMC is its General Conference, "[t]he legislative body for the entire Church," which meets every four years. *BOD/UMC* Glossary at 598. The General Conference has the power to define and fix the powers, duties and privileges of church membership, of elders, deacons and preachers, of the Annual, Central, District and Charge Conferences and of the episcopacy; to establish commissions for the general work of the church and to provide a judicial system and procedures to direct all connectional enterprises of the Church. *BOD/UMC* ¶¶ 12-15 at 22-25.

b. *The Council Of Bishops And The Episcopacy*

UMC's Council of Bishops has "oversight of the spiritual and temporal affairs of the whole Church" and is "the corporate expression of episcopal leadership in the Church." *BOD/UMC* ¶ 525 at 227. Individual Bishops of UMC are each "general superintendents of the whole church" and together comprise the "episcopacy," the UMC system of government whereby Bishops serve as general superintendents of UMC. *BOD/UMC* ¶ 50 at 34-35; Glossary at 602; ¶ 525 at 227. Individual Bishops

[9] Employees of Pacific Homes were treated as lay employees of UMC for pension purposes. Lerach Affidavit, Ex. No. 74. Pacific Homes was advised by its counsel that its retirement plan was exempt from the Employee Retirement Income Security Act of 1974 as a "church plan" because Pacific Homes was an "agency of a church" since it was "controlled by a church." Lerach Affidavit, Ex. No. 75.

have "presidential supervision" in their jurisdiction and are "to lead and oversee the temporal affairs of The United Methodist Church." *BOD/UMC* ¶ 54 at 35; ¶ 513 at 221.

District superintendents of UMC are ministers (appointed yearly by the Bishop) who administer the work of the church within a district. *BOD/UMC,* Glossary at 599, 602, ¶ 514 at 222, ¶ 527 at 228.[10] The Bishops and district superintendents have the "task . . . to see that all matters, temporal and spiritual, are administered in a manner . . . faithful to the mandate of the church." *BOD/UMC* ¶ 501 at 212. These superintending officers are the "formal leadership in The United Methodist Church." *BOD/UMC* ¶ 501 at 212.

c. *The Annual Conferences*

UMC has 74 Annual Conferences in the United States. An Annual Conference is "the basic administrative body" of UMC "bearing responsibility for the work of the Church in a specific territory." *BOD/UMC* Glossary at 597. Each Annual Conference has a "Cabinet" consisting of "[t]he resident bishop and the district superintendents of an Annual Conference . . . ." *BOD/UMC* Glossary at 595. These Cabinets "exercise meaningful corporate leadership" by meeting "at stated intervals."

[10] This is a unique system and operates to insure that UMC has control over local churches. Unlike some denominations, local UMC churches have no power to select their own pastor—this function being reserved for the Bishops of UMC. The courts have recognized the importance of this to the parent church. *E.g., Goodson v. Northside Bible Church,* 261 F.Supp. 99, 102 (S.D. Ala. 1966), *aff'd,* 387 F.2d 534 (5th Cir. 1967) ("Under this system, ministers are assigned to churches by the officials of the parent body rather than by act of the local congregation. The ministers are thus subject to the control of the parent rather than the local body.").

BOD/UMC ¶ 526 at 227-228. "The Cabinet is charged with the oversight of . . . the temporal affairs of a conference . . . ." *BOD/UMC* ¶ 526 at 228.

d. *Local UMC Churches*

Local churches are organized under and are subject to the *BOD/UMC* and governed by the Charge Conference. *BOD/UMC* Glossary at 595. The Charge Conference is "the connecting link between the local church and the general Church" and has "general oversight of the Administrative Board(s) of the local Church(s)." *BOD/UMC* ¶ 243 at 123. A local church cannot buy or sell real estate or build or buy a new church without authorization of the Charge Conference, the pastor and the district superintendent. *BOD/UMC* ¶¶ 2429, 2431, 2432, 2433, 2440 at 547-554. Trustees of a local church hold its property in trust *not* for the local church but for the parent UMC. *BOD/UMC* ¶ 2401 at 532.

e. *UMC's Central Treasury*

In 1974, in seeking a "group [tax] exemption to be granted in the name of the United Methodist Church and its affiliated organizations," GCFA represented to the Department of the Treasury that it was "the central treasury and fiscal agent of The United Methodist Church." Walton-Myers Deposition, Exhibit No. 3 at 2. The exemption was granted to the "Council on Finance and Administration of The United Methodist Church, a/k/a the United Methodist Church, and Its Affiliated Organizations." Walton-Myers Deposition, Ex. No. 6 at 1.

UMC is currently operating under this group tax exemption and has not advised the federal government that any of the representations made in its application for the exemption

are false. Wayland Deposition at 59. UMC's application included the following representations:

> The United Methodist Church is a connectional church governed by the General Conference under the Constitution of the United Methodist Church . . . . The Book of Discipline of the United Methodist Church is construed by law as a contractual agreement between the parent denomination and its members. Inasmuch as the subordinates and affiliates of the General Conference are an integral part of the United Methodist Church connection, acceptance of the United Methodist Church name, and the Book of Discipline of the United Methodist Church as governing legislation, constitutes a grant of authority to the General Conference to establish through legislation the governmental structures of the Church to which said affiliates and subordinates will support and adhere.

Walton-Myers Deposition, Ex. No. 3 at 1-3.

Pursuant to the group tax exemption, UMC's 1975 revenues of $1,081,080,372 (Wayland Deposition, Ex. No. 2 at 6) were exempt from federal taxes; the exemption also operated to exempt church land, buildings, equipment and furniture valued at $7,915,056,401 from local taxation. Walton-Myers Deposition, Ex. No. 7 at 1.

GCFA "provides property, investment, and management functions for the general church" (*BOD/UMC* Glossary at 600) and exercises "on behalf of the General Conference a property management function, by holding the title to and managing real property for the use of general agencies of the Church." *BOD/UMC* ¶ 907(3) at 338. GCFA is accountable[11]

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[11] *Accountability*. The requirement upon an organized structural unit in the United Methodist Church to report, explain, or justify its action(s) to another unit in the church structure. *BOD/UMC* Glossary at 591.

and amenable[12] to UMC through the General Conference in all matters relating to the receiving, disbursing and reporting of general church funds. *BOD/UMC* ¶¶ 904, 906 at 330, 333. GCFA has the responsibility to "receive, collect, and hold in trust for the benefit of The United Methodist Church, its general funds . . . any and all donations, bequests, and devises of any kind . . . that may be given . . . to the United Methodist Church as such . . . ." *BOD/UMC* ¶ 906 at 336.

> GCFA has the authority and responsibility to: *take all necessary legal steps to safeguard and protect the interests and rights of The United Methodist Church;* to maintain a file of legal briefs related to cases involving The United Methodist Church, and to make provisions for legal counsel where necessary in order to protect the interests of the Church at the request of a general agency or a bishop, as the Council deems advisable. . . .

BOD/UMC ¶ 907(4) at 338-339 (emphasis added).

GCFA's control of UMC's finances includes broad powers specifically delineated in ¶¶ 906, 907 and 910 at 335-344 of the *BOD/UMC*.

IV.

THE ACTION AGAINST UMC AS AN UNINCORPORATED ASSOCIATION DOES NOT VIOLATE THE DUE PROCESS RIGHTS OF MEMBERS AND UNITS OF UMC WHO HAVE NEITHER BEEN NAMED NOR SERVED AS DEFENDANTS BECAUSE FEDERAL LAW PROHIBITS SATISFACTION OF ANY JUDGMENT AGAINST UMC FROM THEIR INDIVIDUAL ASSETS.

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[12] *Amenability*. The requirement upon an organized unit in The United Methodist Church to answer to, act under instruction of, agree with, yield to, or submit to another unit in the church structure. *It connotes legal responsibility.* *BOD/UMC* Glossary at 529 (emphasis added).

UMC argues as though this action is against, and seeks recovery from, each of the almost 10 million individual Methodists and 43,000 local UMC churches. UMC's position exhibits an inexplicable failure to grasp the fundamental nature of a suit against an unincorporated association as an entity.

Federal case law provides that a judgment obtained against a partnership or other unincorporated association is binding upon the entity; and, if personal liability is asserted against individual defendants, judgment may be rendered against those over whom the court has personal jurisdiction but not against those who are not personally served and who do not submit to the court's jurisdiction. *Sugg v. Thornton,* 132 U.S. 524, 530-531 (1889); *Western Mutual Fire Insurance Company v. Lamson Brothers & Company,* 42 F.Supp. 1007, 1012 (S.D. Iowa 1941); *East Denver Municipal Irrigation District v. Doherty,* 293 F. 804, 806-809 (S.D.N.Y. 1923); *Esteve Brothers & Company v. Harrell,* 272 F. 382, 383-384 (5th Cir. 1921).

In *Operative Plasterers', supra,* the issue was whether "the North Carolina court violate[d] due process by allowing [a trade] Association to be sued as an entity." *Id.* at 62. The court concluded there was no due process problem, stating:

> Theoretically, in a suit against an unincorporated association as an entity, there might be said to be a due process question in the sense of whether or not there is a party in existence before the court against whom a judgment *in personam* can be entered, but such a question seems to be determined by the Coronado Case. Indeed, so far as due process is concerned there is no greater problem in allowing a suit which seeks to reach a common fund to lie against an unincorporated association as an entity than there is in allowing a suit to lie against a corporation as such. The corporate entity and the unincorporated association *"entity for purpose of suit"* are both fictions of the law.

93 F.2d at 64-65 (footnote omitted) (emphasis added).

In this case, liability, if it is established, will be against UMC —not against individual Methodists or units of UMC neither named nor served in this action.

Plaintiffs *have not sued any individual member of UMC.* Plaintiffs do not, and under federal law could not, seek to bind the individual members of UMC to the judgment being sought without personally naming and serving them. If Plaintiffs ultimately prevail, it is only the common assets of the association, not the assets of its individual members, that will be available to satisfy the judgment against UMC.[13]

V.

IN A CIVIL ACTION BY PRIVATE CITIZENS SEEKING EQUITABLE RELIEF OR MONEY DAMAGES ARISING FROM WRONGFUL SECULAR CONDUCT CONSISTING OF BREACH OF CONTRACT, FRAUD AND STATUTORY VIOLATIONS, A CIVIL COURT MAY RULE,

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[13] The assertions on pages 2, 3, 6, 19, 25, and 31 of UMC's Petition to the effect that UMC has "no assets of any kind" are directly contrary to the *BOD/UMC* which makes clear that associational funds exist and are designated "general church funds." *See, e.g., BOD/UMC* ¶ 906 at 336. These monies include at least $60 million per year collected at the local church level and funneled through Annual Conference treasurers to UMC's central treasury, GCFA. *See, e.g.,* Walton-Myers Deposition, Ex. No. 2 at 17-18. The District Court found "as to . . . those funds the General Council on Finance and Administration is the fiscal arm of the United Methodist Church." Petitioners' Appendix A at A-13. "To add a constitutional requirement, however, that before UMC can be recognized as an entity, plaintiffs must also identify each asset that may be reached to assure the absence of any third party claim in that asset, is to create an issue where one does not exist." *Barr v. UMC, supra,* 90 Cal.App.3d at 272.

WITHOUT VIOLATING THE CONSTITUTIONAL GUARANTEE OF RELIGIOUS FREEDOM, THAT A RELIGIOUS ORGANIZATION IS SUABLE AS AN UNINCORPORATED ASSOCIATION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 17(b), EVEN THOUGH THE ORGANIZATION'S WITNESSES OPINE THAT IT CANNOT BE SUED.

A. *No Constitutional Issues Regarding The Freedom Of Religion Clauses Are Presented By This Action.*

UMC contends that it is constitutionally immune from this action because (i) its witnesses are of the opinion that it is not a jural entity and a court may not conclude to the contrary without rewriting UMC's polity, and (ii) a finding that UMC is suable as an unincorporated association would impair the free exercise of the Methodist faith. *See* UMC Petition at 2-3. In its Mandamus Petition to the Ninth Circuit, UMC insisted that the District Court "cannot constitutionally look away from the expert assistance offered to it and impose single entity status where the UMC polity admits of none." UMC Petition for Mandamus at 28.

> [T]hose who call themselves Methodists have governed themselves since the formation of this State in a connectional and hierarchical form of church government. *Further, the polity of the United Methodist Church and its predecessor organizations is readily identifiable as a hierarchical church structure. No reason for inquiry into church doctrine or interpretation of ecclesiastical law is necessary to reach this conclusion.* See Book of Discipline U.M.C. (1968), *supra,* ¶ 1501.

Brady v. Reiner, ... W. Va. ....., 198 S.E.2d 812, 841 (1973) (emphasis added). *See also Carnes v. Smith,* 236 Ga. 30, 38, 222 S.E.2d 322, 325, *cert. denied,* 429 U.S. 868 (1976); *Jones v. Wolf, supra,* 47 U.S.L.W. at 4965, quoting from *Carnes v. Smith,* ("a local church affiliated with a hierarchical religious association 'is part of the whole body of the general church and is subject to the higher authority of the organization and its law and regulations.' ").

Nevertheless, UMC seeks to establish constitutional immunity for it by telling the civil courts that in this litigation, as opposed to previous litigation where UMC was trying to protect its property interests, that they may not even look for the entity known as UMC. UMC seeks to convert its adversarial position in this litigation into a religious rite and thereby to preclude inquiry into or evaluation of evidence other than the passages of the *BOD/UMC* it prefers and the opinions of its witnesses. This position has been consistently asserted by UMC and GCFA in this and related litigation and has been rejected by the California Court of Appeal, the California Supreme Court, the United States District Court for the Southern District of California, the Ninth Circuit Court of Appeals, Mr. Justice Rehnquist, and this Court. *See, infra* at 5-7.

When a religious organization is alleged to have violated the rights of private citizens in a secular context, the courts have the power and the duty to adjudicate the dispute in accordance with the rules and laws generally applicable to all members of society. As this Court said recently in its *Jones v. Wolf* decision, "neutral provisions of state law governing the manner in which churches own property, hire employees or purchase goods" . . . "cannot be said to 'inhibit' the free exercise of religion. . . ." *Jones v. Wolf, supra,* 47 U.S.L.W. at 4964. Were this not so, resolution of all secular disputes between private citizens and unincorporated religious organizations would be placed beyond the jurisdiction of the civil courts. It is no reflection on either Methodism or UMC to state the obvious — religious organizations are capable of all

forms of conduct — good and bad, helpful and harmful, honest and dishonest. The people comprising religious organizations are human beings, subject to age old human frailties and capable of inflicting harm on other citizens in the course of pursuing their religious mission. Neither they nor the persons who speak for religious organizations, whether from the pulpit or in the courtroom, are infallible.

The District Court in *Trigg* held:

> Now, churches, of course, may exercise both religious and temporal powers, and the United Methodist Church, through its wide ranging, world-wide activities is, in my view, fully on the temporal scene. Its property holdings and monetary collections involve certainly millions, and perhaps billions, of dollars. In matters affecting its property rights and alleged security [sic] law violations, the United Methodist Church is able to assert its legal entitlements and is fully answerable in the courts of the United States.

Petitioners' Appendix A at A-17.

The true thrust of UMC's constitutional argument — that it has constitutional immunity from any civil action against it and cannot be held answerable for wrongful secular conduct except on its own terms, which apparently are that only certain subordinates with limited resources can be sued — was recognized by the Court of Appeal in the *Barr* action:

> To defer absolutely to authoritative church experts would be to grant immunity to religious organizations in cases which might arise far afield from religious activities with the resultant effect that civil courts would then be subordinate to organizations which might attempt to classify themselves as religious to obtain the benefits of the shield of First Amendment protection.

90 Cal.App.3d at 274.

Not even in resolving church property disputes, does "the First Amendment require the States to adopt a rule of compulsory

deference to religious authority." *Jones v. Wolf, supra,* 47 U.S.L.W. at 4964. Yet, UMC asks this Court to adopt such a rule of compulsory deference in civil disputes arising from secular conduct.

It must be emphasized that this is not:

1. A suit between units of UMC or a suit seeking review of an internal church ruling or decision concerning church property, doctrine or administration;
2. A suit by a governmental agency attempting to impose upon UMC any sort of regulation; or
3. A suit in any way calling into question or affecting the manner in which Methodists exercise their beliefs or establish their Church's discipline or polity.

No case has been cited, and none has been found, where a suit against a religious organization by private citizens for breach of contract, statutory violations and tortious conduct was barred by the freedom of religion clauses of the state or federal constitutions. Every case cited by UMC to support its position involved an *internal church dispute* over church property or church administration, or the attempt of a governmental entity to impose regulations upon a church.[14]

In *Serbian Eastern Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 713 (1976), this Court established that, in *internal*

[14] *National Labor Relations Board v. Catholic Bishop of Chicago,* ..... U.S. ....., 99 S.Ct. 1313 (1979), cited by Petitioners at 30, is no exception. There the Court held as a matter of statutory construction that Congress did not intend the National Labor Relations Act to give the National Labor Relations Board jurisdiction over church-operated schools. The decision contains no holding of constitutional law and, in any event, involved the attempt of a governmental agency to subject religious schools to pervasive schemes of governmental regulations in the area of employee relations.

church disputes, "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchial polity . . . ."

Jones v. Wolf underscores that the constraints placed upon civil courts apply only to intra-church disputes:

> It is also clear, however, that "the First Amendment severely circumscribes the role that civil courts may play in resolving *church property disputes.*" *Id.,* at 449. Most importantly, the First Amendment prohibits civil courts from *resolving church property disputes* on the basis of religious doctrine and practice.

Jones v. Wolf, supra, 47 U.S.L.W. at 4963 (emphasis added).[15]

Additionally, Mr. Justice Rehnquist has specifically rejected GCFA's claim that opinion evidence presented by a religious organization's witnesses must be accepted without further inquiry by civil courts.

> In my view, applicant plainly is wrong when it asserts that the First and Fourteenth Amendments prevent a civil court from independently examining, and making the ultimate decision regarding, the structure and actual operation of a hierarchical church and its constituent units in an action such as this. There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastical cognizance and polity in adjudicating intrachurch disputes. See *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, supra.* But this Court never has suggested that these constraints similarly apply outside the context of such intraorganization disputes. Thus, *Serbian Orthodox Diocese* and the other cases cited by applicant are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. *Id.,* 426 U.S. at 709-710, 96 S.Ct. at 2380-2381. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract and statutory violations are alleged. As the Court stated in another context, "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." *Cantwell v. Connecticut,* 310 U.S. 296, 306 . . . (1940).

General Council on Finance and Administration of The United Methodist Church v. Superior Court, supra 99 S.Ct. at 38.

No decision of any UMC tribunal was presented for review to the District Court. No UMC ecclesiastical tribunal has ruled that UMC is not an unincorporated association.[16] Therefore, even if the constitutional restraints applicable to intra-church disputes were relevant to this secular dispute, the essential preconditions necessary to trigger the application of the judicial deference doctrine embodied in *Serbian Orthodox* are not present. The United States has not delegated to UMC the authority to transform its "ecclesiastical tribunals," created by the

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[15] The dissent in *Jones v. Wolf* makes even clearer that these constraints are with respect to intra-church disputes:

> Accordingly, in each case involving an *intra-church dispute*—including disputes over church property—the civil court must focus directly on ascertaining, and then following, the decision made within the structure of church governance.

Id. at 4968 (emphasis added).

[16] Within the past month GCFA has procured a ruling from the Judicial Council of UMC to the effect that *BOD/UMC* ¶ 907(4) does not mean what it says. Petitioners' Appendix E; UMC Petition at 24. This ruling was not presented to the lower courts and is not a part of the record on review. Moreover, the timing of this ruling immediately after the decision by the Court of Appeal in *Barr v. UMC* suggests that this ruling was collusively obtained for the purpose of seeking review in this Court. *See Jones v. Wolf, supra,* 47 U.S.L.W. at 4965, n. 8. If the various entities of UMC truly have the degree of independence UMC claims, what purpose does the Judicial Council have and who is bound by the Council's decisions?

BOD/UMC for the resolution of internal church disputes into forums with the power to adjudicate the civil rights of private citizens seeking equitable relief or money damages for secular conduct in violation of federal law.

Contrary to the position UMC has taken over years in church schism disputes,[17] UMC has argued throughout this litigation that it is merely a loose, decentralized, non-authoritarian confederation of persons sharing common religious beliefs. Hence, UMC clearly seems to be arguing that it is congregational, as opposed to hierarchical, in structure. Indeed, whether UMC is a hierarchical religious association, as the term has heretofore

[17] When UMC and its subordinate units have found it to their advantage to utilize the civil courts to retain control of UMC's property in church schisms, they represent to the courts, and the courts have without exception ruled, that UMC's polity is hierarchical in the sense of being a highly centralized, integrated association. *Carnes v. Smith,* 236 Ga. 30, 222 S.E.2d 322, *cert. denied,* 429 U.S. 868 (1976); *Brady v. Reiner,* ..... W.Va. ....., 198 S.E.2d 812 (1973); *Western Pennsylvania Conference of The United Methodist Church v. Everson Evangelical Church of North America,* 312 A.2d 35 (Pa. 1973); *United Methodist Church v. St. Louis Crossing Independent Methodist Church,* 150 Ind. App. 574, 276 N.E.2d 916 (1971); *Ohio Southeast Conference/Evangelical United Brethren Church v. Kruger,* 243 N.E.2d 781, 17 Ohio Misc. 8 (1968); *Trustees of Peninsula Annual Conference v. Spencer,* 183 A.2d 588 (Del. 1962); *Hoffman v. Tieton View Community Methodist Episcopal Church,* 34 Wash.2d 38, 207 P.2d 699 (1949); *Goodson v. Northside Bible Church,* 261 F. Supp. 99 (S.D. Ala. 1966) aff'd 387 F.2d 534 (5th Cir. 1967); *Brooks v. Chinn,* 52 So.2d 583 (La. 1951); *Clay v. Crawford,* 298 Ky. 654, 183 S.W.2d 797 (1944); *Turbeville v. Morris,* 203 S.C. 287, 26 S.E.2d 821 (1943); *United Methodist Church, et al. v. Sparrow,* Civil No. 6881 (Superior Court of Dooly Co., Georgia 1976); *Board of Trustees, Ohio Annual Conference v. Richards,* 58 Ohio Op. 219, 130 N.E.2d. 736 (Ohio Com. Pleas 1954).

been used is the very question which UMC seeks to preclude the courts from independently deciding in this case, arguing that the courts must accept UMC's witness' opinions as to its polity.

However, UMC cannot insist that it is not hierarchical and simultaneously invoke the judicial deference doctrine when deference is available only to organizations of hierarchical polity. *Jones v. Wolf, supra,* 47 U.S.L.W. at 4963, 4965; *Serbian Eastern Orthodox Diocese v. Milivojevich, supra,* 426 U.S. at 709, 713.

UMC attempts to sidestep this dilemma by admitting that it is hierarchical, but then redefines the term so that hierarchical "does not indicate that it has a highly centralized government, holds assets, or acts as an entity." UMC Petition at 23. In short, UMC wants to be hierarchical when to be so enables it to prevail over local churches in property disputes, or claim First Amendment rights, but congregational when third parties ask it to answer for its torts. UMC cannot have it both ways.

B. *Freedom Of Religious Action, As Opposed To Belief, Is Not Absolute And May Be Subjected To Neutral Legislation Having A Secular Purpose And Enacted To Ensure The Public Peace, Tranquility And Welfare.*

UMC challenges religiously neutral legislation which permits suits against unincorporated associations and is intended to facilitate legal remedies to citizens of the United States.[18] UMC has never claimed that Rule 17(b) of the Federal Rules of Civil

[18] Plaintiffs believe that the First Amendment does not apply to this secular dispute between private citizens, alleging violation of their statutory rights, and a religious organization. *See* Section V.A., *supra,* at 26-33. For the purpose of the following argument only, Plaintiffs are willing to assume, but do not concede, that the First Amendment does apply in this case.

Procedure is not a religiously neutral enactment. The rule involved has a legislative purpose that is entirely secular and a primary effect that neither advances nor inhibits religion.

"[A] violation of the Free Exercise Clause is predicated on coercion" and, therefore, "it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *School District of Abington v. Schempp,* 374 U.S. 203, 223 (1963). Even if legislation has a "coercive effect," it must be determined whether the impact is upon beliefs or upon conduct, since the Free Exercise Clause embraces two concepts: "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut,* 310 U.S. 296, 303-304 (1940). Hence, while government may not prohibit or burden religious beliefs, "freedom to act, even when the action is in accord with one's religious convictions," may be reasonably restricted by neutral legislation. *Braunfeld v. Brown,* 366 U.S. 599, 603 (1961); *see McDaniel v. Paty,* 435 U.S. 618, 628 n.8 (1978); *Reynolds v. United States,* 98 U.S. 145, 166 (1879).

The conduct of UMC at issue in this action arises from the sale of Bonds to raise capital for the commercial operation of retirement homes. As applied to this case, Rule of Civil Procedure 17(b) does no more than require UMC to answer in court for its alleged violations of the secular rights of private citizens. The commercial sale of securities to the public by a religious organization is not a protected religious activity if, Plaintiffs, as they allege, were defrauded into purchasing the securities. *Securities and Exchange Commission v. World Radio Mission, Inc.,* 544 F.2d 535, 538-540 (1st Cir. 1976), (Defendant

religious organization unsuccessfully claimed its allegedly fradulent actions in connection with the sale of securities to the public was entitled to First Amendment protection.); *See also Cantwell v. Connecticut, supra* 310 U.S. at 306 ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit fraud upon the public.").

> Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, *the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests.*

Wisconsin v. Yoder, 406 U.S. 205, 215-16 (emphasis added). *See also Prince v. Massachusetts,* 321 U.S. 158, 170-171 (1944) (However Jehovah's Witnesses may conceive them, the public highways have not become their religious property merely by their assertion); *De La Salle Institute v. United States,* 195 F. Supp. 891, 903 (N.D. Cal. 1961) ("The tenets of the [Catholic] Church cannot broaden the statutory exemption. What is a 'church' for purposes of the statute must be interpreted in the light of the common understanding of the word."); *Riker v. Commissioner,* 244 F.2d 220, 227-229 (9th Cir.), *cert. denied,* 355 U.S. 839 (1957) (sincere conviction and logical argument that operating a restaurant is a church function is not binding on a court).

Plaintiffs recognize that the state may not burden or restrict the free exercise of religion in the absence of a substantial and legitimate state interest. *See Wisconsin v. Yoder, supra* 406 U.S. at 215. Here, however, the governmental interest is substantial.[19] Congress has enacted the rule involved in this action

---

[19] Other governmental interests far less fundamental than those present in this case have been held to justify neutral legislation

(This footnote is continued on next page)

for the purpose of permitting citizens to sue organizations functioning as unincorporated associations to remedy violations of their rights. The existence of substantive statutory rights and the procedural means to remedy their violation are the cornerstones of the concept of ordered liberty which permit all citizens of society to coexist peacefully, resolving their disputes through court procedures, thus avoiding resort to remedies of self-help with the violence and societal disruption which would inevitably flow from such action.

> Conceivably [religious organizations] may engage in virtually any worldly activity, but it does not follow that they may do so as specially privileged groups, free of the regulations that others must observe. If they were given such freedom, the direct consequence of their activities would be a diminution of the state's power to protect the public health and safety and the general welfare. With that power so easily diminished there would soon cease to be that separation of church and state underlying the constitutional concept of religious liberty.

Gospel Army v. City of Los Angeles, 27 Cal. 2d 232, 245, 163 P.2d 704, 712 (1945) (emphasis added).

---

which directly impinges upon the rights of persons or groups to act according to their religious convictions. *See, e.g., Braunfeld v. Brown, supra* (state law barring retail sales on Sunday); *Prince v. Massachusetts, supra* (state child labor law); *King's Garden, Inc. v. Federal Communications Commission*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974) (federal rules against sectarian employment practices); *Parker v. Commissioner*, 365 F.2d 792 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967) (federal income tax law); *United States v. Kissinger*, 250 F.2d 940 (3d Cir.), *cert. denied*, 356 U.S. 958 (1958) (federal agricultural marketing law); *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954) (federal minimum wage law); *Watchtower Bible & Tract Society v. Los Angeles County*, 181 F.2d 739 (9th Cir.), *cert. denied*, 340 U.S. 820 (1950) (state property tax law).

C. *Establishment Of A Special Privilege For Religious Organizations In Secular Disputes Whereby The Opinions And Conclusions Of Their Witnesses Must Be Accepted Without Judicial Weighing Or Consideration Of Contrary Evidence Would Unconstitutionally Establish Religion.*

UMC seeks to establish a special evidentiary privilege for religious organizations involved in civil litigation arising from secular disputes which would not be available to secular organizations. UMC insists that this Court replace the specific findings of the Court below with UMC's witnesses' characterization of its structure and operation, regardless of what an objective reading of the organization's constitution and by-laws reveals. Establishment of such a privilege violates the Constitution and this Court's admonition that courts "must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause." *Wisconsin v. Yoder, supra*, 406 U.S. at 220-221. *See Herbert v. Lando*, ... U.S. ....., 99 S.Ct. 1635, 1648-1649 (1979).

In *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court recognized that many of the early settlers of this country came here to escape the oppression, persecutions and civil strife visited upon them by religious groups which had obtained governmental support for their particular doctrinal beliefs. *Id.* at 8-10. The freedom loving colonials abhorred oppressive practices of established religious sects, and it "was these feelings which found expression in the First Amendment." *Id.* at 11. Given this background, it is unthinkable that the framers of the First Amendment intended that the opinions and conclusions of members of religious organizations in secular disputes be treated as infallible.

The Establishment Clause demands governmental neutral-

ity with respect to religious belief, doctrine and dogma. *School District of Abington v. Schempp, supra* 374 U.S. at 226-227 (1962). It is clear that government action "establishes" religion in violation of the First Amendment when it directly aids one or all religious groups whether this aid operates to coerce non-believers or not. *Id.* at 222; *Engel v. Vitale,* 370 U.S. 421, 430-431 (1962). Granting religious organizations the benefit of having their witnesses' opinions treated as binding on civil courts operates to establish religion by placing religious organizations beyond civil court jurisdiction and permitting them to avoid their secular legal obligations.

> Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.

Reynolds v. United States, supra 98 U.S. at 166-167.

UMC does not dispute the power of the courts to rule on whether UMC can be sued as an unincorporated association, so long as those courts conclude that it cannot be so used. To make available the coercive powers of civil courts to rubber-stamp the strategic postures taken by church organizations in purely secular litigation, when such deference is not accorded to secular voluntary associations, would breach the wall of separation between church and state.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Dated this 25th day of July, 1979.

Respectfully submitted,

MILBERG WEISS BERSHAD & SPECTHRIE
By: WILLIAM S. LERACH
GREGG A. JOHNSON

WIED GRANBY ALFORD & ARKIN
By: COLIN W. WIED
DAVID J. YARDLEY

Attorneys for Real Parties in Interest

APPENDIX A

APPENDIX A

TO CLERK:

DATE

Re: No. 78-3044

I certify that the judges concerned concur in this order. Please file it.

United States Circuit Judge

ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

PACIFIC METHODIST INVESTMENT FUND, *et al.*,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
Respondent,
AND
CHARLES W. TRIGG, *et al.*,
Real Parties in Interest.

FILED
SEP 14 1978
EMIL E. MELFI, JR., CLERK
U. S. COURT OF APPEALS
No. 78-3044
D.C. #78-0198
Southern Calif.
ORDER

Before: WALLACE and KENNEDY, Circuit Judges.

In order to allow this Court to consider the merits of petitioners' emergency motion for stay pending filing of petition for writ of mandamus, the emergency motion is treated as a petition for writ of mandamus in its own right and is hereby denied.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1855

PAUL W. MILHOUSE and EWING T. WAYLAND, Being Those Persons upon Whom Service of Process Was Attempted on Behalf of THE UNITED METHODIST CHURCH, a Named Defendant in the Underlying Action,

Petitioners,

VS.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent.

and

CHARLES W. TRIGG, et al.,

Real Parties in Interest

On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL STATEMENT AND REPLY BRIEF OF PETITIONERS

ALBERT E. JENNER, JR.
KEITH F. BODE
EUGENE R. WEDOFF

JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

SAMUEL W. WITWER, SR.
SAMUEL W. WITWER, JR.

WITWER, MORAN, BURLAGE & ATKINSON
125 S. Wacker Drive
Chicago, IL 60606
(312) 332-6000

ALLAN J. RENICHE
DANIEL R. SALAS
WILLIAM F. FAHEY

SULLIVAN, JONES & ARCHER
1400 Financial Square
600 'B' Street
San Diego, CA 92101
(714) 236-1611

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On Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL STATEMENT AND REPLY BRIEF OF PETITIONERS

SUPPLEMENTAL STATEMENT OF FACTS

Since the filing of the petition for certiorari herein, petitioners filed with the District Court a motion to vacate the entry of default against the United Methodist Church and to permit the petitioners to file an answer on behalf of the denomination. The proposed denominational answer con-

tinued to assert that the United Methodist Church was not a jural entity and that the petitioners were not authorized by the denomination to speak in its behalf. However, in view of the District Court's determination to the contrary, and in order to avoid a substantial default judgment, petitioners were prepared to answer on behalf of the denomination to the extent anyone could do so. Respondents herein opposed the motion, stating:

> "All that is, again, is an attempt to raise what was decided by this Court, and has passed before the other courts, the Ninth Circuit, and is now before the United States Supreme Court. If they want to file an affirmative defense, let them say that the United Methodist Church has filed them [sic]."
>
> Transcript of Argument, July 21, 1979, at 13.

After a hearing, the District Court accepted respondents' arguments, held the proposed answer to be inadequate and refused to vacate the default. *Id.* 18-24.

This new development is included herein and addressed in the argument regarding due process and standing, below, pursuant to Supreme Court Rule 24(5).

ARGUMENT

The petition for certiorari in this case asks this Court to determine whether there are constitutional limitations on the "unincorporated association" rule which prevent a non-cohesive religious denomination, such as the United Methodist Church, from being sued for damages. The brief in opposition attempts simply to ignore these questions. In what amounts to a theological treatise authored by persons without theological competence, respondents posit the United Methodist Church as a monolith, with some central force directing the actions of each denominational unit.[1] Their technique is to attribute to the international denomination labeled "UMC," all of the actions taken by any individual member or unit within the denomination, thus, for example, insisting that this petition was brought by "UMC" and that "UMC" litigated the issues in the District Court. (Brief in Opposition—"Br."—at 5, 7, 9n. 5, 12, etc.)

In fact, the United Methodist Church is not a monolith; it has not and cannot take any action in this lawsuit. And it is precisely for this reason that the petitioners—those served with process in the name of the denomination—have challenged that service, contending that the United Methodist Church cannot, consistent with due process and the guaranty of free exercise of religion, be remade into a litigating entity.

In this reply, then, petitioners first point out the falsity of the numerous representations about the denomination contained in the brief in opposition, note respondents' failure to address the constitutional issues raised by the petition, answer the new "standing" argument asserted in the

[1] "Respondents" refers to the plaintiffs in the underlying proceeding, who are the real parties in interest.

opposition brief and finally, show that this case is ripe for review and has reached a decisive point. Much of the matter raised by respondents in their opposition brief is dealt with in the Petition for Writ of Certiorari in *Frank T. Barr* v. *The United Methodist Church,* presently pending before this Court as No. 79-245 (the "*Barr*" case). Petitioners respectfully renew their suggestion that the *Barr* case be consolidated and considered together with the present one.

I.

RESPONDENTS' BRIEF DISTORTS UNITED METHODIST POLITY TO CREATE THE FALSE APPEARANCE OF A MONOLITHIC ENTITY

In the trial court, respondents took the position that any organization could be sued as an unincorporated association so long as its members had a common purpose and common name. (Plaintiffs' Consolidated Memorandum, June 30, 1978 at 45.) The implications of that position, as noted in the petition, are absurd; significantly, respondents do not contend for it in their brief in opposition. Rather, they would have this Court believe that the United Methodist Church is a quasi-corporate entity, the type of organization for which the unincorporated association rule was devised. See *United Mine Workers* v. *Coronado Coal Co.,* 259 U.S. 344 (1922). Respondents attempt to prove the "corporate" existence of United Methodism by gathering bits and pieces of church literature and fragmentary *Book of Discipline* references to the "Church." These they take as showing that the entire denomination functions as a "contractor," an "employer," an "owner of property," a "litigator" and the like. The argument apparently is that since these functions have been ascribed to "UMC," it must be a separate quasi-corporation jural entity, wholly ignoring the fact that such

references are intended to relate to the functions of the many separate religious units which collectively comprise the denomination.

As any practicing United Methodist knows, respondents are quite wrong. The fallacy of their expedient presentation is that it is question-begging. Whenever reference is made to "Church" in *The Book of Discipline,* respondents conveniently assume the very point at issue; namely, that the term refers to some unified corporate body of jural character, rather than the worldwide spiritual confederation which it really is.

Looking past respondents' rhetoric to the uncontradicted expert evidence, it is clear that The United Methodist Church, as a total denomination, has never done any acts which would be illustrative of a unitary legal capacity. There are absolutely no "jural activities" carried on by any discrete denomination-wide entity, comparable to the international union in *United Mine Workers. All* such activities in United Methodism are those of individual denominational units (App. Ex. 2, Par. 2).

A few examples of the respondents' technique, which apparently influenced the District Court, suffice to illustrate the error of their characterizations.

1. The Denomination as "Contractor."

Each of the 45,000 jural units of United Methodism, of course, has the capacity to contract. Yet, respondents declare that an overarching additional entity, "UMC," "is a party to contracts." (Br. at 18.) If this were the fact, borne out by a history of denominational contract-making over its two hundred years of ministry, respondents surely would have introduced numerous such contracts made or executed by the "United Methodist Church" or its antecedents. In-

stead, after extensive discovery, the best support which respondents can muster for their claim is the language contained in Pars. 670-671 in *The Book of Discipline* wherein churchmen discuss the "Church's" responsibility for covenants of religious comity and cooperation with other religious groups.[2] *The Book of Discipline* gives no authority to any person or continuing body to contract on behalf of the entire denomination.

2. The Denomination as "Employer."

Each of the denomination's constituent units, of course, has employees. Respondents insist that "UMC" also "has employees" (Br. 19.) Again, if this were factual, and reflected by a history of employment activity on a denominational plane, respondents surely would have produced witnesses describing themselves as employees of the "United Methodist Church," *per se,* and would have amassed paychecks, withholding slips, an employer identification number and other typical employment materials issued by the United Methodist Church. Yet even after wide-ranging discovery, no such showing has been or can be made. Instead, respondents again turn to selected passages in *The Book of Discipline,* giving the Board of Pensions (a separate incorporated denominational unit) certain responsibilities with regard to persons described as "employees of The United Methodist Church." (*The Book of Discipline,* at Par. 1701.)

In their assertions to this court, respondents never consider the possibility that "Church employee" might refer broadly to persons employed by a local church, board,

[2] Respondents also refer to the denomination as a party to a $1 billion insurance policy. This matter is discussed at pages 32-33 of the petition in *Barr.* The policy was taken by GCFA, covered only specified church units, and had a $1 million liability limit. The annual premium is only $19,991. (R. Ex. 29 at 2736)

agency, or other unit within the United Methodist connection; yet, that is precisely what the term means.[3] "The United Methodist Church" (in the entity sense in which the respondents seek to sue it) has employed no person. App. 2, at Par. 2.

3. The Denomination as "Owner."

Despite a complete absence of any deeds, title papers or other evidence of conveyance or ownership, the respondents proclaim that "UMC . . . owns property." (Br. at 18.) When it appears to suit an emotional purpose, respondents refer to the $1 billion in total givings of United Methodists throughout the world to their local churches and aggregate the property values of all such individual churches (Br. at 22) to suggest that "UMC" *per se,* is the owner of vast wealth. Again, respondents' only support is their interpretation of *The Book of Discipline,* ¶¶ 6, 2401, 2403 and 2445, based on the assumption that the denominational name is used with the quasi-corporate meaning they advocate. Yet the undisputed expert testimony is that all titles to property within United Methodism are in the individual units, and none are in the collective denomination, viewed by respondents as an entity. (App. 2 at Par. 2; App. 4 at 5-6; Fraser Dep. at 42).

[3] It is not surprising that occasional reference to the denomination as a singular noun in daily parlance and disciplinary sentence structure has been made in the 200-year history of the connection. Every major religious denomination is usually referred to as "the church," and those words can have any number of meanings, in religious usage, denoting anything from a local community church to an annual conference, to the total denomination, to the entire fellowship of Christians worldwide. See discussion of religious terminology in Note, 75 Harv. L. Rev. 1142, 1160; also definition of "church" in *The Random House Dictionary of the English Language* 264 (1973 ed.).

Nor can the trust clauses (*The Book of Discipline,* Pars. 2401 and 2403) be fairly cited for the proposition that the denomination is an "owner" in the usual sense, or a "controlling" single-bodied entity. As the unanimous expert testimony showed (App. 2, Par. 2; Wayland dep. at 226; Leiffer dep. at 148-149), individual units within the denomination hold real property for their own use and for the benefit of those who are members of the general faith. This method of protecting charitable and religious holdings is firmly entrenched in our common law. *See, e.g., Brady* v. *Reiner,* 198 S.E.2d 812 (W.Va. 1973). Trust clauses merely insure that the voluntary gifts of worshippers for the purpose of carrying out the religious mission of a particular faith will be conserved for common denominational purposes at the level and location where such properties were initially placed into service. Within United Methodism, there is no central decision-maker to conduct surveillance and decide when to litigate to enforce trust clauses. Such cases are brought by annual conference officials in the affected locality —usually by district superintendents (*i.e.,* ministers who are assigned by a bishop to coordinate the work of local churches within a district or sub-area of an annual conference). Since the trust clauses are not centrally administered, there is no mechanism for seizure of local properties by the "United Methodist Church," nor is there any "reverter" procedure or any history of relocating title or control away from a dissident local unit into a title-holding entity known as the "United Methodist Church." Wayland Dep. at 226.

4. The Denomination as "Litigator."

Respondents' treatment of cases concerning property disputes in the United Methodist Church likewise portrays

"UMC" as the actor in cases brought by units within the denomination. (Br. at 32.) As noted in the petition (at 22n.8), the United Methodist Church, as an entity, has never engaged in litigation.

Respondents' misuse of the term "UMC" is by no means confined to these instances. To the contrary, there are no less than 38 instances misleadingly inserted throughout the opposition brief, in which the respondents state that "UMC" is the active party in the present litigation (*E.g. "UMC asks* this Court to disregard substantial evidence . . ." Br. at 12; *"UMC challenges* the determinations of the District Court . . ." Br. at 13; *"UMC seeks* to establish constitutional immunity. . . ." Br. at 27). Respondents thus assume the point in issue—whether there is a corporate structure capable of speaking as "the United Methodist Church"—and by their driving repetition seek to create the impression that their assumption is unquestioned.[4]

It nevertheless remains the case that the United Methodist Church is a connectional confederation of largely independent, separate entities, without central management, headquarters or funds. The questions raised by this case must be decided on that basis.

---

[4] In their effort to invest the denomination with the appearance of a unified jural activity, Respondents have even resorted to the gimmick of transmitting a $10 check payable to the United Methodist Church. (Br. at 17.) Respondents' counsel arranged to have the check sent by their legal secretary to 1200 Davis Street, Evanston, Illinois (the offices of GCFA), accompanied by a letter representing that it was "to further the work of the United Methodist Church". The check was cleared and credited to the World Hunger Fund of the General Council on Ministries—scarcely an event of great legal significance. It is now obvious that the purpose of the check was not to further religion, but to structure a legal strategem.

II.

RESPONDENTS HAVE FAILED TO DEMONSTRATE HOW THE CASE MAY PROCEED AGAINST THE DENOMINATION WITHOUT SERIOUS DENIALS OF DUE PROCESS.

The petition identified two major areas in which the constitutional guarantee of due process is offended by the holding that the United Methodist Church is an unincorporated association: (a) the denomination as a whole is without the structural or functional capacity to conduct litigation; and (b) a judgment against the denominational name would be enforced by levying on presently unidentified religious units whose individual properties are claimed to be "associational." Respondents have made no response whatever to the first problem. They have given only a cursory treatment to the second. (Br. at 23-25.)

Respondents have advised this court that no United Methodist unit will have its property rights concluded *in absentia* in this case, "because federal [case] law prohibits satisfaction of any judgment against UMC from their individual assets." (Br. at 23.) This again, is wholly question-begging. The issue is whether assets held by separate units of United Methodism will later be subject to levy on the claim that they are "actually" assets of the whole denomination. That issue must be addressed, because there are no assets whatever held by the denomination per se. Each denominational unit whose property may be at stake has the due process right to defend on the merits, and not at some later date when all questions of the merits have been concluded and mere judgment satisfaction proceedings remain. Respondents cannot explain this problem away.

Furthermore, respondents have not been at all clear in advising this Court and the courts below concerning their

design for judgment execution. In the proceedings below, the most that they would say is that there was no intention to seek the property of *individual* United Methodists (*e.g.*, Plaintiffs' Consolidated Opposition to Defendants' Motions, dated June 30, 1978, at 17.) When the proceedings reached this Court, respondents apparently sensing that their ambivalence on judgment execution could harm their case, "refined" their position. In papers filed with Mr. Justice Rehnquist, in *Barr,* opposing a Stay Pending Review on Certiorari, they sought to assure the Circuit Justice that no due process infringements were intended because they really meant "UMC" to include only the two units (GCFA and PSWAC) specifically named. Respondents said:

> "In this case [Barr], liability, when it is established, will be against the UMC . . . not against individual Methodists *or units of UMC not named and served in this action.*"
>
> Opposition to Application for Stay, S.Ct. Misc. No. A-1084, filed June 18, 1979, at 24-25 (Emphasis added)

A similar statement is made in their opposing brief to this Court in the instant proceeding. (Br. at 25.)

These assertions stand in sharp contrast to the account which Plaintiffs' counsel gave Judge Schwartz during oral arguments on the Motions to Dismiss. The colloquy was as follows:

> "The Court: In other words, why are you suing, why do you want to sue the United States Methodist Church as a jural entity?
>
> "Mr. Lerach: Because, I believe, Your Honor, that it is the only entity that has sufficient funds to respond in damages to make the Plaintiffs whole in this case."
>
> Transcript of August 15, 1978 at 37

In fact, the only reason for naming the denomination in addition to the appearing defendants is to obtain additional assets by levying upon "general funds" held by unnamed and absent units. Respondents state (Br. at 25 n.13): "associational funds exist and are designated 'general church funds.'" Respondents thus seek to leave the impression that "general" means "unrestricted," or "surplus," as that term might be used in "general funds of the State of California" or "general funds of IBM corporation." Yet "general" is a word used in United Methodist parlance to identify approximately 5½% of worshippers' donations which local churches choose to earmark for use by a small segment of the denomination; namely, the 13 "general level" boards carrying out prescribed national and global missional programs. (Wayland dep. at 215, 218-19) After the amount of the local churches' "general" contribution is decided within the local church (those churches are free to limit or even omit any such donations), the funds are routed to the local annual conference which, in turn, forwards the same to GCFA. GCFA then acts as a conduit in distributing the designated funds to the end recipient. Such "general" funds are no more "associational" funds of all United Methodism than are "local" funds in the possession of local community churches or "annual conference" funds in the possession of individual units like the Pacific and Southwest Annual Conference. In short, if respondents can seize these "general" level funds used to support the missions of the general level agencies, either in transit through GCFA or in the hands of the boards who are the end recipients, there is no logical reason why they cannot also seize the bank accounts of local churches, annual conferences, and other similar religious units.

III.

RESPONDENTS DO NOT ADDRESS, OR EVEN CORRECTLY IDENTIFY, THE INFRINGEMENT UPON RELIGIOUS FREEDOM POSED BY THIS CASE

This case presents the further question of whether requiring United Methodists to litigate as an entity infringes on their right to practice their religion freely. The issue is straight-forward: does the centralization required for such litigation impermissibly conflict with the decentralized "connectionalism" of United Methodism? The answer to that question cannot be determined without an in-depth assessment of United Methodist polity. The issue now before this Court is, thus, an essentially religious controversy, and not the "purely secular" securities law matter which respondents depict. The respondents ignore this issue, and instead deal with two other issues which are not raised by the petition.

First, respondents assert that petitioners are seeking a holding that their experts' testimony is infallible. (Br. at 37). Not so. Petitioners merely have asserted the obvious: that courts are not well equipped to delve into the nuances of religious organization without expert assistance. This principle was stated in *Watson* v. *Jones,* 13 Wall 679, 729 (1872) and is reflected in this Court's holdings minimizing interference by civil courts in internal religious disputes. *E.g., Jones* v. *Wolf,* ___ U.S. ___, 47 U.S.L.W. 4962 (July 2, 1979). It is, however, no less applicable in cases brought by third parties. Petitioners have thus suggested that, in determining the government and structure of the United Methodist Church, the District Court should not have ignored the substantial body of unanimous expertise concerning the details of the denomination's polity.[6]

[6] There is no factual basis for respondents' statement that "[t]he organization's witnesses opined that it cannot be sued." (Br. at 26.) In fact, as the record shows, such witnesses did not invade the province of the court with such a bald conclusion, but rather, confined their testimony to detailed descriptions of the relationships, activities and usages within the denomination.

Petitioners have never insisted that a civil court must rubber-stamp the expertise of church authorities. However, this is not a case where a court, faced with alternative interpretations of denominational polity offered by differing theological experts, was required to resolve the issue by crediting one interpretation as authoritative over another. Here, respondents could not, or would not, produce a single expert witness in support of their contentions. What resulted was the spectacle of civil lawyers, unaffiliated with United Methodism, and totally unfamiliar with its tenets prior to the inception of the case, expounding in minute detail on the most complex and religiously sensitive aspects of the denomination's polity. Respondents continue this practice before this Court. Yet, ironically, these strangers to the denomination describe their own self-serving interpretation as an "objective reasoning," (Br. at 37) while implying that the expert testimony of denominational leaders was false (Br. at 12), or derisively labeling it as "infallible" (Br. at 27.)

Second, respondents continue to treat this case as though United Methodists were seeking religious immunity (Br. at 26), despite the fact that every one of the approximately 45,000 separate and distinct units of United Methodism, most of which are incorporated, stands ready to be sued and defend for its acts and omissions.

Petitioners have never quarreled with the premise that religious *entities* may not flaunt civil law in their secular activities. However, respondents' citation of cases to that effect begs the very question of first impression here at bar. That question is whether a whole religious system, as opposed to one or more component jural units comprising it, can be forced into an entity status under the label "unincorporated association," answerable as a single unit, irrespective of its internal structure and nature. Several separate United Methodist related corporations have been made

parties defendant in the *Pacific Homes* cases and not one of them has questioned its suability or jural status. Each has answered. If respondents seek relief against still other units of the denomination, they should simply name them, not try to reach all others, collectively, in an attack on the denominational name as a totality.

On its face, respondents' web of litigation against the whole denomination reveals a quest for "deep pocket" and a convenient target for *in terrorem* litigation techniques. This Court's decision in *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723 (1975) expressed great concern about the danger of vexatious and unfounded litigation, recognizing that the court processes are often invoked in aid of a settlement strategy on the theory that "the very pendency of the lawsuit may frustrate or delay normal business activity of the defendant, which is totally unrelated to the lawsuit." 421 U.S. at 723. *Cf.* Burger, C. J., in *Reiter* v. *Sonotone Corporation,* 47 U.S.L.W. 4672, 4676 (June 11, 1979). Just such processes are at work here, challenging the chosen government of religious believers.

IV.

THERE IS NO BASIS FOR RESPONDENTS' CLAIM THAT PETITIONERS LACK STANDING TO CHALLENGE SERVICE OF PROCESS UPON THEM.

Respondents curiously maintain (Br. at 8-11) that Bishop Milhouse and Dr. Wayland, although respondents singled them out as authentic agents or representatives of The United Methodist Church for service of process, lack standing herein.[7] This mistaken argument merely reflects the

[7] Respondents have omitted any mention of First Amendment cases where this Court has employed a more liberal standard in disputes over standing. See, *e.g., Flast* v. *Cohen,* 392 U.S. 83 (1968) (religious freedom) and *Law School Research Council* v. *Wadmond,* 401 U.S. 154 (1971) (chilling of free association).

irony of respondents' efforts against the United Methodist Church.

In denying that they could accept service on behalf of the United Methodist Church as an unincorporated association, the petitioners never denied that they were United Methodists or that they were interested in whether United Methodists could be fused into a single litigating entity. Their interest was, in fact, sufficiently obvious that respondents did not hit upon a standing argument until this case was before the Ninth Circuit Court of Appeals on petition for mandamus. (The Ninth Circuit did not accept the standing argument, but denied review on other grounds.)

Respondents' standing argument simply underscores the central question of this lawsuit—who *is* supposed to act for the denomination? All of the decisions cited by respondents for denying standing disqualified a litigant whose "stake" in a given issue is tenuous, on the assumption that some other person or entity (whose jural status is undisputed) would be better situated to raise the point. *E.g., Tileston* v. *Ullman,* 318 U.S. 44, 46 (1943). Here, of course, the "other" litigant whose appearance is insisted upon by the respondents is the denomination itself, whose disputed entity status and capacity to litigate is at the very heart of the proceeding. To say that the persons served with process cannot litigate these questions is to eliminate any effective mechanism for advising this Court on the issues at hand.[8] The denomination has no capacity to do so. Thus, respondents' insistence that interests encompassed within the United Methodist denomination be defended only through the appearance of something called the "United Methodist Church" is in actuality an impossible demand that the denomination at once constitute itself a legal entity in order to appear in court and deny its entity status.

[8] While not openly acknowledging this dilemma in their court papers, respondents' counsel have done so with evident relish in their communications with potential class members. In a form of newsletter or monthly litigation report beamed at the residents of Pacific Homes, said counsel stated as follows: "If it [The United Methodist Church] responded to the Complaint [in the *Barr* proceeding] in the ordinary fashion, it would admit that it was capable of doing the things that legal persons do, thereby mooting its challenge to being sued." On the other hand, in the event of default, the residents are told, ". . . [this] cuts off the right of UMC to file anything at all in the case [except] . . . a request to set aside the default. However, [under California law] . . . it would be very difficult to get the default withdrawn." Finally, referring to the instant certiorari petition, the document advises putative *Barr* class members that ". . . it appears now more clearly than ever, that UMC is in the case to stay."

Ex. "A" to Motion to Prohibit Unauthorized Communications with Potential Class Members in *Barr*, filed September 10, 1979, at 1-3.

This paradox will continue as long as the litigation is permitted to be maintained against the United Methodist Church as an unincorporated association. Most recently, respondents successfully attacked an answer which petitioners sought to file in the underlying proceedings, on behalf of the denomination, because the "UMC" itself did not unqualifiedly submit the answer and because petitioners attempted to preserve the defenses of the denomination's capacity. Transcript of Hearing, July 16, 1979, pp. 18-24. Yet, lacking any central executive, it is manifest that some individual United Methodist member or unit must answer if any answer is to be made.

By refusing the tendered answer, as by their standing argument, respondents seek to foreclose any effective review of the capacity issues. Their suggestion is that the denomination simply default—thus conceding judgment to them if the capacity question should ultimately be resolved in their favor. (Br. at 5.)

There is no one who can effectively litigate on behalf of all United Methodism. Therefore, petitioners must be allowed to raise the question of capacity, and this court should grant reviews before further impossible litigation is required by respondents. This is not a mere interlocutory matter as casually pronounced by respondents. While no final judgment order has been entered (nor can such an order properly be entered while numerous other jural co-defendants are defending on the merits without violence to the "one judgment" rule of this Court in *Frow* v. *De La Vega*, 82 U.S. 552 (1872), a point of practical finality has been reached. Irreversible damage to constitutionally protected values will necessarily attend any further proceedings against the denomination. The issues are thus ripe and require this court's prompt corrective intervention.

CONCLUSION

For the reasons stated above, and in the Petition for Writ of Certiorari, petitioners respectfully pray that their petition be granted.

Respectfully submitted,

ALBERT E. JENNER, JR.
KEITH F. BODE
EUGENE R. WEDOFF

JENNER & BLOCK
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

SAMUEL W. WITWER, SR.
SAMUEL W. WITWER, JR.

WITWER, MORAN, BURLAGE & ATKINSON
125 S. Wacker Drive
Chicago, IL 60606
(312) 332-6000

ALLAN J. RENICHE
DANIEL R. SALAS
WILLIAM F. FAHEY

SULLIVAN, JONES & ARCHER
1400 Financial Square
600 'B' Street
San Diego, CA 92101
(714) 236-1611

Attorneys for those persons upon whom service of process was attempted on behalf of The United Methodist Church.

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1855

PAUL W. MILHOUSE and EWING T. WAYLAND,

Being Those Persons Upon Whom Service of Process Was Attempted on Behalf of THE UNITED METHODIST CHURCH, A Named Defendant Below,

Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

Respondent,

and

CHARLES W. TRIGG, *et al.*,

Real Parties in Interest.

MOTION OF THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA FOR LEAVE TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI AND BRIEF CONDITIONALLY FILED IN SUPPORT THEREOF

THOMAS A. SHAW, JR.

BREED, ABBOTT & MORGAN
Attorneys for Amicus Curiae *the National Council of the Churches of Christ in the United States of America*
Office and P.O. Address
Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 888-0800

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PLEASE TAKE NOTICE that, pursuant to Rule 42 of the Rules of this Court, the National Council of the Churches of Christ in the United States of America hereby moves for

leave to appear and file a brief, a copy of which is conditionally annexed hereto, as *amicus curiae* in support of the Petition for a Writ of Certiorari filed by Petitioners Paul W. Milhouse and Ewing T. Wayland, being those persons upon whom service of process was attempted on behalf of The United Methodist Church, a named defendant in the underlying action.

The interest of The National Council of the Churches of Christ in the United States of America ("the National Council") in the Petition for a Writ of Certiorari arises from its concern for the constitutionally guaranteed freedom of each of its member denominations to establish, maintain and define its own internal structural organization as a matter of ecclesiastical polity and doctrinal interpretation, free from state interference.

The National Council seeks to appear as an *amicus curiae* to present additional argument on the following points:

1. The impact on the free exercise of religion by other denominations and the Christian Church as a whole by the decision below.
2. The constitutionally impermissible entanglement of the courts in the church polities of other denominations which will result from application of the test for suability of denominations adopted below.
3. In view of the grave First Amendment problems presented by the decision below, it can only be sustained upon a threshold finding, not made below, of a clear expression on the part of the drafters of

Rule 17(b), Fed. R. Civ. P., of the intention to include religious denominations within the term "unincorporated association" as used therein, or an equally clear expression by the California Legislature of its intention to include religious denominations within the term "unincorporated association" in enacting Section 388 of the Code of Civil Procedure. As observed by this Court in *National Labor Relations Board* v. *The Catholic Bishop of Chicago*, —— U.S. ——, at ——, 99 S. Ct. 1313, at 1322 (1979):

"[I]n the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the [National Labor Relations] Board, we decline to construe the [National Labor Relations] Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."

The National Council is incorporated under the Not-For-Profit Corporation Law of the State of New York. As stated in the Preamble to its Constitution, the National Council "is a cooperative agency of Christian communions seeking to fulfill the unity and mission to which God calls them." Its member communions total thirty-one Protestant and Orthodox religious denominations with an aggregate membership of 42,000,000 individuals throughout the United States. The National Council is organized exclusively for religious purposes. By its certificate of incor-

poration it is committed "to promote the application of the law of Christ in every relation of life."

Respectfully submitted,

BREED, ABBOTT & MORGAN

By .....

Thomas A. Shaw, Jr.
Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 888-0800

Attorneys for the National Council of the Churches of Christ in the United States of America, moving for leave to appear as *amicus curiae* in support of the petition for a writ of certiorari

To: Office of the Clerk
Supreme Court of the United States

All Counsel Listed on the Annexed Affidavit of Service*

* Counsel for petitioners, Witwer, Moran, Burlage & Atkinson, have consented to this motion, pursuant to a letter which has been filed with the Clerk of this Court. The consent of counsel for respondents was requested but refused.

IN THE

Supreme Court of the United States

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No. 78-1855

PAUL W. MILHOUSE and EWING T. WAYLAND,

Being Those Persons Upon Whom Service of Process Was Attempted on Behalf of THE UNITED METHODIST CHURCH, A Named Defendant Below,

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CHARLES W. TRIGG, *et al.*,

Real Parties in Interest.

BRIEF OF THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE UNITED STATES OF AMERICA IN SUPPORT OF ITS MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* AND CONDITIONALLY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Interest of *Amicus Curiae*

The interest of The National Council of the Churches of Christ in the United States of America ("the National Council") in the Petition for a Writ of Certiorari filed by those persons upon whom service of process was attempted on behalf of the United Methodist Church, a named defendant, arises from its concern for the constitutionally guaranteed freedom of each of its member denominations to establish, maintain and define its own internal structural organization as a matter of ecclesiastical polity and doctrinal interpretation, free from state interference.

This brief is being conditionally filed with and in support of the motion of the National Council for leave to appear as *amicus curiae* herein. The National Council seeks to appear as an *amicus curiae* to present additional argument on the following points:

1. The impact on the free exercise of religion by other denominations and the Christian Church as a whole by the decision below.
2. The constitutionally impermissible entanglement of the courts in the church polities of other denominations which will result from application of the test for suability of denominations adopted below.
3. In view of the grave First Amendment problems presented by the decision below, it can only be sustained upon a threshold finding, not made below, of a clear expression on the part of the drafters of Rule 17(b), Fed. R. Civ. P., of the intention to include religious denominations within the term "unincorporated association" as used therein, or an equally clear expression by the California Legislature of its intention to include religious denominations within the term "unincorporated association" in enacting Section 388 of the Code of Civil Procedure. As observed by this Court in *National Labor Relations Board* v. *The Catholic Bishop of Chicago*, —— U.S. ——, at ——, 99 S. Ct. 1313, at 1322 (1970):

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The National Council is incorporated under the Not-For-Profit Corporation Law of the State of New York. As stated in the Preamble to its Constitution, the National Council "is a cooperative agency of Christian communions seeking to fulfill the unity and mission to which God calls them." Its member communions total thirty-one Protestant and Orthodox religious denominations with an aggregate membership of 42,000,000 individuals throughout the United States. The National Council is organized exclusively for religious purposes. By its certificate of incorporation it is committed "to promote the application of the law of Christ in every relation of life."

Statement of the Case

The circumstances of the present litigation, as well as the opinions below, the jurisdiction of this Court and the federal constitutional provisions and rule involved, are set forth in the Petition for a Writ of Certiorari (hereinafter referred to as "the Petition") and need not be repeated at length here. In addition, California Code of Civil Procedure § 388 (West 1973) provides in pertinent part:

> "(a) Any partnership or other unincorporated association, whether organized for profit or not, may sue and be sued in the name which it has assumed or by which it is known."

California Corporation Code § 24000 (West 1977) provides in pertinent part:

> "(a) As used in this part 'unincorporated association' means any partnership or other unincorporated organization of two or more persons, whether organized for profit or not, but does not include a government or governmental subdivision or agency."

On August 15, 1978, the United States District Court for the Southern District of California issued an oral opinion (a transcript of which is included as Appendix C to the Petition) denying petitioners' motion to dismiss the named defendant the United Methodist Church ("UMC") for lack of jurisdiction over the person and for insufficiency of service of process pursuant to Federal Rules of Civil Procedure 12(b)(2) and 12(b)(5), respectively.* The District Court erroneously accepted respondents' unsupported assertion that the UMC "is sueable as an unincorporated association, namely a hierarchical, jural entity . . ." (Transcript, Appendix to the Petition, Appendix C at A-9). In reaching that conclusion, the District Court unconstitutionally substituted its own view of the UMC organization, including its own construction of the UMC Book of Discipline, for the authoritative and unanimous testimony of ecclesiastical experts. Thereafter, the Court of Appeals for the Ninth Circuit denied mandamus to review and its denial is now before this Court.

* Petitioners thereupon orally requested, and the District Court orally denied, certification of the order pursuant to 28 U.S.C. § 1292 (b). The formal order denying petitioners' motion to dismiss was entered on August 23, 1978, and by order dated September 6, 1978 the District Court denied petitioners' motion for reconsideration of its refusal to certify the question.

Summary of Argument

The position of the National Council may be simply stated: the District Court's decision that the unincorporated denomination referred to as "The United Methodist Church" is a jural entity or unincorporated association subject to suit is clearly erroneous in that it utterly fails to extend the deference to religious authorities which the Constitution requires in all matters of essentially religious or theological concern. Failure to reverse the constitutional error committed by the District Court

(1) would unconstitutionally abridge the free exercise of religion, for it would necessarily force all religious denominations to re-examine and reorganize their internal church polities in light of the unprecedented potential for civil liability arising from the activities of a local or affiliated unit;

(2) would lead to the unconstitutional preference of some denominations over others by reason of almost in-

evitable holdings that some relatively closely organized denominations (*e.g.*, the Roman Catholic Church) are suable entities while relatively loosely organized denominations (*e.g.*, the Baptists) are not;

(3) would result in the gross intrusion and entanglement of the courts in church doctrine and polity of other denominations against which actions will undoubtedly be atttempted for the real or imagined wrongs done claimants by local parishes or congregations, hospitals or nursing homes, in direct contravention of this Court's consistent view that, under the First Amendment, "civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones* v. *Wolf*, —— U.S. ——, 99 S. Ct. 3020, 3025 (1979); and

(4) would improperly require this Court to resolve the foregoing difficult First Amendment questions in the absence of a clear expression of intent, under either Rule 17(b), Fed. R. Civ. P., or Section 388 of the California Code of Civil Procedure, to include religious denominations within the term "unincorporated association."

The freedoms of religion from State interference contained in the First Amendment have long been construed to compel judicial deference to ecclesiastical authorities in all controversies involving issues of faith, dogma and church governance. The internal structures, or polities, of the various Christian denominations in the United States and throughout the world do not reflect mere decisions of style or administrative convenience, but rather embody distinctive and fundamental principles of theological belief.

Consequently, State revision or misinterpretation of church polity would violate the Constitution no less than would a rewriting or censorship of the underlying tenets of Christian faith.

In the instant case respondents have persuaded the District Court to impose a judicially-created associational cohesiveness upon the UMC and its member congregations in the face of unanimous and uncontradicted ecclesiastical authority establishing that these congregations form only a loosely related "connectional" polity with no central authority controlling their spiritual or temporal affairs. Although there are religious units within or affiliated with the UMC which are incorporated and may therefore exist as *suable* jural entities, including the named defendant corporations General Council on Finance and Administration of the United Methodist Church ("GCFA") and the Pacific and Southwest Annual Conference of the United Methodist Church ("PSWAC"), the District Court's characterization of the United Methodist denomination itself as such an entity, particularly in the face of uncontradicted and authoritative theological testimony to the contrary, plainly violates fundamental Constitutional guarantees and subjects *all* denominations to the danger of judicial revision of religious organizational principles. The District Court's order must be promptly reversed.

ARGUMENT

POINT I

The First Amendment requires judicial deference to church construction of ecclesiastical matters.

It has long been established that the First Amendment forbids governmental interference with, or revision of, a religious denomination's resolution of ecclesiastical issues. The core meaning of the constitutional guarantees of religious freedom, contained in the "Establishment" and "Free Exercise" clauses of the First Amendment, is "that we will not tolerate either governmentally established religion or governmental interference with religion." *Walz* v. *Tax Commission,* 397 U.S. 664, 669 (1970). In order to give practical effect to these constitutional guarantees, this Court has established under the First and the Fourteenth Amendments* "the general rule that religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them." *Serbian Eastern Orthodox Diocese for the United States of America* v. *Milivojevich,* 426 U.S. 696, 713 (1976).

This fundamental constitutional principle requiring judicial deference to church interpretation of doctrinal issues has been invoked most frequently in cases developing out of denominational schisms, such as disputes involving church property, *see, e.g., Maryland and Virginia Eldership*

* The guarantees of religious freedom established by the First Amendment are undisputedly made applicable to the states by the Fourteenth. *McGowan* v. *Maryland,* 366 U.S. 420, 429 (1961); *Cantwell* v. *Connecticut,* 310 U.S. 296, 303 (1940).

of the Churches of God. v. *Church of God at Sharpsburg, Inc.,* 396 U.S. 367 (1970) (*per curiam*); *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 449-53 (1969); *Kreshik* v. *St. Nicholas Cathedral of the Russian Orthodox Church of North America,* 363 U.S. 190 (1960) (*per curiam*); *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679, 727-29, 732-35 (1872)*; *cf. Kedroff* v. *St. Nicholas Cathedral of the Russian Orthodox Church in North America,* 344 U.S. 94 (1952) (legislative interference), or those involving alleged entitlement to church positions, *see, e.g., Serbian Orthodox Diocese, supra,* 426 U.S. at 708-720; *Gonzales* v. *Roman Catholic Archbishop of Manila,* 280 U.S. 1 (1929).

Nevertheless, the constitutional prohibition against judicial interference with matters of church law and governance is not restricted in its application to intra-denominational disputes over church property or position. Although it is admittedly disputes of that nature which are most likely to generate religious controversies, it is the fact that doctrinal issues are raised, not the mere procedural circumstance that the dispute is intra-church, which compels judicial deference to authoritative ecclesiastical sources. Whether the specific formal contentions involve property, title or governance, "[w]hat is at stake [in such cases] is the power to exercise eligious authority," *Ked-*

* *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679 (1872) was a diversity action decided before the application of the First Amendment to the states and also before *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). Although it consequently constituted a statement of general federal law, its language has been recognized as having "a clear constitutional ring." *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 446 (1969); *accord, Serbian Eastern Orthodox Diocese for the United States of America* v. *Milivojevich,* 426 U.S. 696, 710 (1976).

roff v. *St. Nicholas Cathedral, supra,* 344 U.S. at 121 (Frankfurter, J., concurring). Consequently, whenever essential religious identities or principles are at stake, in whatever context the exercise of religious authority or doctrinal interpretation is placed in issue, "the First Amendment requires that the [civil] courts give deference to the [church's] determination of that church's identity [or polity]." *Jones* v. *Wolf, supra,* 99 S. Ct. at 3028 (footnote omitted). The fact that the instant action involves a claim alleged by a third party against a religious denomination does not alter this fundamental constitutional principle *insofar as issues of faith or doctrine* are raised. As discussed in Point II, *infra,* the question of church organization at issue in this case is clearly one which is an essential and inextricable part of core doctrinal concerns.

In this respect, the order and opinion issued by Mr. Justice Rehnquist as Circuit Justice in a related proceeding is entirely inapposite. In that order Justice Rehnquist denied the emergency application of the General Council on Finance and Administration of the United Methodist Church ("GCFA") for a stay of all proceedings pending Supreme Court resolution of GCFA's petition for certiorari. *General Council on Finance and Administration of the United Methodist Church* v. *Superior Court of California,* —— U.S. ——, 99 S. Ct. 35 (1978). In its petition GCFA contended that the trial court had erroneously asserted "long-arm" personal jurisdiction over it by misconstruing the functions it performed on behalf of the United Methodist Church. GCFA, concededly an Illinois not-for-profit corporation which administers a small percentage of the total donations received by local United

Methodist churches, did not dispute its own jural status as a suable entity. In rejecting GCFA's jurisdictional argument, Justice Rehnquist concluded that the lower court's rationale was not "entirely clear, ' and that its grounds for decision may not have included "its interpretation of Methodist polity." 99 S. Ct. at 38.

Alternatively, Justice Rehnquist stated his own view to be that First Amendment protections against judicial interference with "matters of ecclesiastical cognizance and polity" may not "apply outside the context of [intra-church] disputes." *Id.* His language makes clear that his reluctance to apply the established principle of non-interference to third-party disputes would be based on his perception of such third-party disputes as "purely secular" and not involving "essentially religious controversies." *Id.* Without expressing any view as to the applicability of these criteria to the corporate defendant GCFA, the National Council of Churches vigorously contends in Point II, *infra,* that the polity of an international religious denomination such as the United Methodist Church, or of the relatively structured Roman Catholic Church as opposed to the relatively unstructured Religious Society of Friends, is precisely such as "essentially religious controversy," not a secular matter subject to civil court resolution.

Finally, to the extent that Justice Rehnquist's decision may be read to propose that civil courts be constitutionally permitted to evaluate doctrinal law and polity independent of authoritative church interpretation, it is respectfully submitted that this position was substantially expressed in his dissent, and rejected by the Court, in *Serbian Orthodox Diocese, supra.*

POINT II

Church interpretation of polity and governance is a theological consideration with which civil courts may not interfere.

Issues of internal church organization and authority constitute essential matters of religious belief, and the lower court's refusal to follow established church interpretation of church polity was constitutionally defective and must be remedied without delay. When presented with unanimous theological authority concerning an issue of denominational polity, as were the lower courts, a civil court is forbidden to substitute its own reading of church organization for that of the pertinent ecclesiastical authorities. The contrary decision by the lower courts constitutes a gross breach of Jefferson's Wall of Separation by asserting the competence and authority of the civil judiciary to decide the age-old issues over which the Wars of the Reformation were fought, issues which divided Protestant from Pope but also divided John Calvin from Martin Luther, John Wesley from Calvin, George Fox and the Quakers from the Church of England.

This Court expressly recognizes that the constitutional protection against state interference with ecclesiastical principles and beliefs, discussed in Point I, *supra,* extends to issues of denominational organization, administration and self-government. As held recently in *Serbian Orthodox Diocese, supra,* "This principle [of avoiding civil interpretation of religious doctrine] applies with equal force to church disputes over church polity and church administration." 426 U.S. at 710. *See also Kedroff* v. *St. Nicholas Cathedral, supra,* 344 U.S. at 116. Supporting this rule, of course, is the Court's recognition that matters of internal church "polity" embody essential principles of religious faith and dogma.* Kauper, *Church Autonomy and the First Amendment—The Presbyterian Church Case,* 1969 Sup. Ct. Rev. 347, 352-55 [hereinafter cited as *Church Autonomy*]; Note, *Judicial Intervention in Church Property Disputes—Some Constitutional Considerations,* 74 Yale L.J. 1113, 1132 *et seq.* (1965); Note, *Judicial Intervention in Disputes Over the Use of Church Property,* 75 Harv. L. Rev. 1142, 1158-1160 (1962).

Justice Brennan, the author of the opinion of the Court in *Serbian Orthodox Diocese,* had previously summarized the constitutional danger of judicial interference with or revision of a denomination's interpretation of its own polity in *Md. & Va. Churches* v. *Sharpsburg Church, supra*:

> "To permit civil courts to probe deeply enough into the allocation of power within a church so as to decide where religious law places control over the use of church property would violate the First Amendment in much the same manner as civil determination of religious doctrine. Similarly, where the identity of the governing body or bodies that exercise general authority within a church is a matter of substantial controversy, civil courts are not to make the inquiry into religious law and usage that would be essential to the resolution of the controversy."

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* "Polity refers to the general governmental structure of a church and the organs of authority defined by its own organic law." Kauper, *Church Autonomy and the First Amendment—The Presbyterian Church Case,* 1969 Sup. Ct. Rev. 347, 352-53 (footnote omitted); *see generally* Schaver, *The Polity of the Churches* (1947).

396 U.S. at 369-70 (concurring opinion) (footnote omitted), cited with approval in *Serbian Orthodox Diocese*, 426 U.S. at 723. For purposes of illustration, two examples of the many denominations in the United States make absolutely clear that the churches' respective polities constitute the outward manifestations of innermost principles of religious faith, and that their fundamental, and constitutionally protected, doctrinal differences are reflected in their equally well-established, and equally protected, organizational differences.

The courts have tended to identify two general but imprecise classifications of church polities: the congregational and the hierarchical. *See, e.g., Md. & Va. Churches* v. *Sharpsburg Church, supra*, 396 U.S. at 369 n. 1 (Brennan, J., concurring).* In the congregational form, each local church congregation is essentially self-governing, independent of ecclesiastical supervision, and autonomous in all matters of doctrine, liturgy and governance. *Watson* v. *Jones, supra*, 80 U.S. at 722, 724-26 (dictum); *Bouldin* v. *Alexander*, 82 U.S. (15 Wall.) 131 (1872); Schaver, *The Polity of the Churches*, 43-44 (1947) [hereinafter *Polity*]; Mead, *Handbook of Denominations in the United States*, 214-18, 242, (1965) [hereinafter *Denominations*]. Among the denominations adhering to this congregational polity are the various Baptist Churches. Central to the Baptists' fundamental theological creed is "the inherent freedom of the individual to approach God for himself," *Denominations* at 35, and consequently "[the Baptists] have insisted

* Although the "congregational/hierarchical" dichotomy distinguishes broadly among polities on the basis of relative concentration or dispersion of authority, it does not, and is not intended to, describe with particularity the wide variety of denominational organizations existing in the United States. *See* discussion at Point III, *infra*.

too upon the absolute autonomy of the local congregation [and] each church arranges its own worship, examines and baptizes its own members." *Id.* Thus the individual's doctrinal freedom to communicate directly and independently with God is reflected in each congregation's freedom from organizational supervision or restraint.

By contrast, in a hierarchical polity the local congregation is a unit of, and subordinate to, a larger organization consisting of ascending positions of ecclesiastical authority. *See, e.g., Serbian Orthodox Diocese, supra*, 426 U.S. at 715 and n. 9; *Presbyterian Church* v. *Hull Church, supra*, 393 U.S. at 441-442. The hierarchical category may be further subdivided into the episcopal polity, in which the various levels of authority rest in the hands of individual clerical officers, such as bishops, and the presbyterial, or synodical, polity, in which authority vests in a hierarchy of representative assemblies of laymen and clerics. *Church Autonomy* at 354-55; Note, *supra*, 75 Harv. L. Rev. at 1143-44. The hierarchical polities of the episcopal form, including that of the Roman Catholic Church, for example, focus all authority in an individual clerical superior who delegates responsibilities to inferior clerics and assemblies.

The Pope is the spiritual and governmental head of the Roman Catholic Church, the supreme authority in all issues of religious faith and church administration. The authoritarian hierarchical polity thus gives tangible shape to the doctrinal belief, central to the Roman Catholic faith, that the Pope is the lineal successor to the authority bestowed by Christ upon his apostle Peter. As proclaimed in the 1964 National Catholic Almanac's summary of Catholic

belief, "[Christ] founded the church on a rock of infallibility and invincibility. . . . [Church] members profess one pastor (the Pope), the successor to St. Peter, to whom Christ committed his whole flock." *Denominations* at 196. From this fundamental religious tenet is derived the rigidly authoritarian polity of the church, including the central principle that papal declarations *ex cathedra* are doctrinally infallible and final on issues of faith. *See Polity* at 22-23. The Roman Catholic belief in the "organic unity of Christ, 'the fullness of the godhead bodily,' with the church 'which is his body' is the essence of Catholic ecclesiology. . . . 'By the very fact of being a body,' said [Pope] Leo XIII, 'the church is visible.' Its existence, institution, and operation are therefore sacramental." 19 Encyclopedia Britannica 464 (1972 ed.).

The foregoing summary of the parallelism between theological doctrine and denominational polity makes clear that, as expressly recognized by this Court, matters of church polity and organization reflect fundamental religious tenets. It is this demonstrable condition which explains the rule of judicial deference in matters of church organization, *Serbian Orthodox Diocese, supra,* since "civil courts in identifying a church's polity for legal purposes are necessarily at the same time passing on an important ecclesiastical question respecting the nature of the church and its authority." *Church Autonomy* at 371; *see, e.g., St. John Chrysostom Greek Catholic Church of Pittsburgh* v. *Elko,* 259 A.2d 419 (Pa. 1969).

Consequently, in order to avoid constitutionally proscribed interference with ecclesiastical concerns, to the

extent a civil court is faced with the responsibility of applying a rule or a statute such as the California's Code definition of an "unincorporated association" to the internal structure of a particular denomination it must (a) determine whether the Legislature intended to include church associations in the suable entities thus defined, *N.L.R.B.* v. *Catholic Bishop of Chicago, supra,* 99 S. Ct. 1313, and, only after making such determination, (b) defer to that denomination's own authoritative construction of church polity, for "lines of authority within polities are apt to be blurred, and the relevant church law chaotic, voluminous, and unintelligible to a court." Note, *supra,* 75 Harv. L. Rev. at 1160 (footnote omitted). *See Serbian Orthodox Diocese, supra,* 426 U.S. at 699 (sources of ecclesiastical law termed "ambiguous and seemingly inconsistent"). Such authoritative constructions may be located in the church's constitutional documents, *see, e.g., Serbian Orthodox Diocese, supra,* 426 U.S. at 715-17 and n. 9; they may be provided by expert canonical witnesses within the church, *id.,* at 718; and they can be confirmed by religious authorities in general. *See Wisconsin* v. *Yoder,* 406 U.S. 205, 209 *et seq.* (1972); *cf. Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. at 125 (Frankfurter, J. concurring).

In this context, it is plain that the opinion below is gravely erroneous. Nothing whatever has been adduced to suggest that the drafters of Rule 17(b), Fed. R. Civ. P., or the California Legislature intended to include church denominations among the unincorporated associations rendered suable in derogation of the common law. *N.L.R.B.* v. *Catholic Bishop of Chicago, supra.* Nor is this a case

in which a court, faced with conflicting interpretations of denominational polity offered by differing theologians, was required to credit one construction as authoritative over another. In this action extensive and unanimous ecclesiastical proof was introduced before the trial court demonstrating that the polity of the UMC is a unique "connectionalism" consisting of largely autonomous local churches connected through nonauthoritarian conferences. Nevertheless, the lower court contradicted the undisputed expert testimony presented by church authorities concerning the UMC's decentralized polity; it imposed another vision of United Methodism which is unsupported by expert religious testimony and thereby characterized the UMC as an authoritarian, hierarchical organization; and it consequently concluded that the church demonstrates sufficient organizational cohesiveness to constitute a jural entity with the capacity to be sued. As is plainly established by the above-cited authorities, such judicial conduct constitutes a fundamental violation of the constitutional principle of avoiding state interference with ecclesiastical questions and must be reversed.

POINT III

The impact of a failure to reverse: judicial contradiction of unanimous church authorities on issues of internal polity would result in the unconstitutional preference of one form of polity over another and would force all religious denominations to revise theologically-based polity to conform to secular standards.

The National Council submits that it is absolutely clear that civil contradiction of unanimous church authority on matters of internal administration and polity, as erroneously effected by the lower court, would effectively restructure the workings of any church at the expense of substantive doctrinal beliefs and of due process.*

Moreover, it is of course established that the First Amendment guarantees that the State cannot "prefer one religion over another," *Everson* v. *Board of Educ.*, 330

* In the case of UMC, this result would impose an entirely artificial and unsupportable organizational structure upon what had authoritatively been considered to be a loosely assembled "connectional" polity. Independent member congregations which had never intended to be, and had never been, accountable for the acts of each other or of the United Methodist denomination itself, would be claimed to be vulnerable to the execution of any judgment which might be entered against the UMC.

Petitioners have made a showing that the UMC denomination does not itself own property or enter into contracts, and that there are *no* "common assets" other than those held by United Methodist units such as GCFA and PSWAC or by individual United Methodist member congregations. GCFA and PSWAC are named as defendants and are concededly jural entities for purposes of suit. Consequently, respondents' attempt to include "the United Methodist Church" as an additional party can only amount to an effort to reach the assets and real property of the 43,000 individual member churches throughout the United States through a judicial reconstruction of United Methodist polity. Further discussion of the polity of United Methodism may be properly left with petitioners.

U.S. 1, 15 (1947), whether by explicitly favorable or unfavorable treatment or by indirect coercive pressure. *Engel* v. *Vitale*, 370 U.S. 421, 431 (1962); *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961). The opinion below unmistakeably suggests that the lower court has determined to permit civil suit against the UMC, due to what the court deemed to be its hierarchical polity and without its consent, while it would deny the capacity of another to be sued because of its congregational or de-centralized polity. Should courts continue to intrude similarly into this issue, they will thereby create an unconstitutional distinction, for "then those who embrace one religious faith rather than another would be subject to penalties; and that kind of discrimination . . . would violate the Free Exercise Clause." *United States* v. *Seeger*, 380 U.S. 163, 188 (1965) (Douglas, J. concurring).

Failure to correct the lower court's unconstitutional judicial revision of church organization in contradiction of church authorities would in turn inevitably force the widespread reorganization of denominational polities into alien and doctrinally meaningless patterns. These reorganizations would be compelled solely in order to avoid the previously unintended, unforeseen, and unprecedented imposition of civil responsibility for the acts of any local or affiliated unit. The First Amendment forbids this result.

Consideration of a small sample of the 223 religious bodies most recently reported in the United States* illus-

* *Yearbook of American and Canadian Churches 1978*, pp. 217-224 (Jacquet ed.) (published by the National Council of Churches). These widely diverse denominations include more than 130,000,000 individual members and over 333,000 separate churches. *Id.*, at 224.

strates the rich diversity of church polities presently enjoyed in this country and graphically demonstrates the potential for chaos contained in the lower court's acceptance of respondents' call for judicially compelled revision of religious organizations.

A. The Roman Catholic Church

The Roman Catholic Church, noted in Point II, *supra*, to be organized in an hierarchical polity of the episcopal form, is the largest single denomination of Christians in the United States with approximately 50,000,000 members. *The Official Catholic Directory for 1977*, cited in *Yearbook of American and Canadian Churches, 1978*, pp. 80, 222 (Jacquet ed.) [hereinafter cited as *1978 Yearbook*]. The central authority in Rome, including the Pope, the Episcopal College and the Roman Curia, exercises world-wide jurisdiction over the local divisions or ordinaries of the Church, which in the United States consist of 135 dioceses and 32 archidioceses normally headed by bishops and archbishops, respectively. *Id.*, at 252. Groups of dioceses form ecclesiastical provinces, and the diocesan heads periodically meet in the form of provincial councils. 19 *Encyclopedia Britannica* 468 (1972 ed.) [hereinafter cited only by volume and page]. The individual diocese is divided into parishes, presided over by pastors, and in 1977 there existed 17,872 parishes with resident pastors and 700 without resident clergy. *1978 Yearbook* at 252. There is no intermediate level of authority between the global authority of the Pope and the local diocesan authority of the bishops, and consequently there is no authority on the *national* level that is responsible for governing the church in the United States. In fact, when the bishops of the United States met perio-

dically to consider issues on a national basis, they initially called their meetings "the National Catholic Welfare Council" but changed the title to "the National Catholic Welfare Conference" at the insistence of the Vatican lest the word "Council" imply that the national aggregation of bishops had some kind of juridical authority or responsibility in the Church. The same is true of its successor body, "the National Conference of Catholic Bishops," and its implementative counterpart, the United States Catholic Conference, neither of which is a governing body of the Roman Catholic Church on a national basis.

A vast number and variety of organizations have been organized or sponsored by constituent units of the Church, including in this country alone more than 10,000 educational institutions and 700 hospitals fully equipped with clerical and lay workers, *id.*, as well as numerous organizations of recent origin designed to facilitate communications among bishops, priests and the laity, including more national councils, diocesan councils, parish councils and parochial school boards. 19 *Britannica* at 488. Although the Church is structured hierarchically, no one could contend seriously that the "Roman Catholic Church" is a suable entity which in itself is civilly answerable for all the activities of each of the subordinate or affiliated organizations, or whose world-wide assets would be subject to levy by an American or foreign court.

B. The Presbyterian Churches

The Presbyterian denomination in the United States similarly presents an hierarchical structure, but whereas the clergy in the Roman Catholic Church are ordained and are

considered to receive their authority from the Pope, the Presbyterian ministry are elected as representatives of the members. There are ten Presbyterian bodies in the United States, of which the two largest are the United Presbyterian Church in the U.S.A. and the Presbyterian Church in the United States, with an aggregate membership of approximately 3,500,000 in more than 12,000 local churches. *1978 Yearbook* at 222-223; 18 *Britannica* 464. As recognized by the Court in *Presbyterian Church* v. *Hull Church, supra,* 393 U.S. at 441-442, the Presbyterian polity consists of four general categories of church judicatories: (1) the session, which is comprised of the pastor and church elders on the local congregational level; (2) the presbytery, which is formed by equal numbers of ministers and lay elders of the churches within a given geographical area; (3) the synod, which is composed of a number of presbyteries; and (4) the General Assembly, which is composed of members elected by the presbyteries. *Denominations* at 178. In Presbyterian churches of American background the presbytery is regarded as the basic unit, 18 *Britannica* at 468, although there are various boards, commissions and councils formed at every level which formulate policy and administer projects in many different areas, including mission work abroad and in the United States; public health and urban development; and education. *Denominations* at 179. Education has been a particularly fruitful field, and among the institutions owing their origin to Presbyterian endeavors are Princeton University and the Union Theological Seminary in New York City. 18 *Britannica* 464-465. In all there are more than one thousand universities and secondary or elementary schools which are either maintained by or associated with the Program Agency of the

United Presbyterian Church in the U.S.A., along with over 200 hospitals and clinics. *Denominations* at 179. Numerous other church councils and boards participate in a variety of educational, health and housing projects. *Id.*; 18 *Britannica* 465.

C. The Society of Friends

Equally active in the community at large though maintaining dramatically different principles of doctrine and polity is the Society of Friends, commonly called Quakers. Approximately one hundred thousand Quakers today participate in the two major American Quaker bodies, the Society of Friends, or Friends United Meeting (formerly the Five Years Meeting of Friends) and the Religious Society of Friends, or Friends General Conference. *Denominations* at 117-118; *1978 Yearbook,* at 57-58, 220. The form of worship and fellowship is founded upon the belief in the priesthood of all believers; men and women share equally in worship and in church organization; no specific creed, prescribed liturgy or outward sacrament is established. *Denominations* at 116; 9 *Britannica* 938, 940-41. Quaker religious services are therefore without uniform practice, and they often depend on quiet meditation and prayer with spontaneous vocal contributions. Even business sessions await "the sense of the meeting" and may have "quiet times" during which unity is sought. *Denominations* at 116; 9 *Britannica* 939-940. The principle unit of church government is the monthly meeting, a body which usually meets once a month on all doctrinal and administrative matters. The quarterly meeting, comprised of between two and twelve monthly meetings, is primarily a deliberative body concerned with worship. Quarterly meetings in turn

are grouped to form yearly meetings, which are forty-five in number and are autonomous, although linked through the Friends World Committee for Consultation ("FWCC"). *Denominations* at 115-117; 9 *Britannica* 940. Despite their lack of any strict, corporation-like executive organization, the Quakers have traditionally been active in public affairs, particularly in the fields of international peace and relief work. The FWCC and the American Friends Service Committee cooperate to assist in the operations of the Economic and Social Council of the United Nations, *Denominations* at 117, and many other programs and publications of regional, national and international scope are administered by or assisted in some fashion by the Quakers. *Denominations* at 117; 9 *Britannica* 942.

D. The Baptist Churches

The largest Protestant community in the United States is composed of approximately 25,000,000 Baptists who participate in twenty-seven different bodies, the largest of which are the Southern Baptist Convention (13,000,000 members and 35,000 churches), the National Baptist Convention, U.S.A., Inc. (5,500,000 members and 26,000 churches), the National Baptist Convention of America (2,700,000 members and over 11,000 churches), and the American Baptist Churches in the U.S.A. (1,600,000 members and 6,000 churches). *1978 Yearbook* at 217, 221, 223; *Denominations* at 33 *et seq.*; 3 *Britannica* 139-40. As discussed in Point II, *supra,* these churches practice a strict form of congregational polity, maintaining the total autonomy of local congregations in the sense that each of these congregations is a manifestation of the whole Church of Christ and need not derive its authority from any other

source. 3 *Britannica* 142-143. The congregations are interrelated in cooperative bodies on the regional, state and national levels but surrender no authority to these larger bodies, which exist to implement the common concerns of the congregations. *Id.* at 142. These cooperative agencies and affiliates exist within each of the Baptist denominations, and they sponsor or are otherwise involved in a wide variety of educational, medical and missionary services in the United States and elsewhere. *Denominations* 34-42.

E. The Mennonite Churches

In sharp contrast are the beliefs of the Old Order Amish Church, a conservative body numbering 15,000 within the general ranks of the 200,000 Mennonites in the United States. *1978 Yearbook* at 221. As with many churches, classification of Mennonite polity is difficult: "the several bodies of Mennonites vary somewhat among themselves, and Mennonites do not fit well into a classification such as congregational, synodal, or episcopal; their polity has elements of all three." 15 *Britannica* 160; *see Denominations* at 143-147. The Old Amish congregations have no general organization, do not conduct conferences, and worship in private homes. *Denominations* at 146; *1978 Yearbook* at 71. As noted in *Wisconsin* v. *Yoder, supra,* 406 U.S. at 209-213, the Amish emphasize withdrawal from modern culture and technology based on their central belief that "salvation requires life in a church community . . . aloof from the world and its values." 406 U.S. at 210.

The foregoing sketch of the polities of several denominations, and the activities in which they or their affiliates are involved, gives an indication of the scope and doctrinal

complexity of the impact which would be created by failure to reverse the lower court. As already noted in the specific case of the Roman Catholic Church, *supra*, it simply cannot be seriously suggested that these denominations constitute suable entities whose national and international assets would be at risk whenever any internal unit or affiliated organization is named in a civil suit.

To permit civil courts to rewrite the laws of authority and responsibility of a church's polity, as the lower court would have done, would compel religious denominations in the future to consult with legal counsel regarding every aspect of their structure of worship. Religious denominations would be forced to retain counsel to rearrange time-honored and doctrinally-based polity in order to avoid the impositions of civil liability, much as commercial corporations must plan for and adjust to the tax or antitrust consequences of various forms of organization. Rather than follow organizational principles derived directly from substantive ecclesiastical doctrine, *see* Point II, *supra*, church authorities would have to revise their modes of worship into unprecedented structures which would be "at odds with fundamental tenets of their religious beliefs," *Wisconsin* v. *Yoder, supra,* 406 U.S. at 218. For example, in 1931 the Congregational Church and the Christian Church merged, and in 1961 they joined with the Evangelical and Reformed Church to form the United Church of Christ. As Congregational bodies, each had originally proclaimed belief in the "freedom and responsibility of the individual soul and the right of private judgment . . . [and held] to the autonomy of the local church and its independence of all ecclesiastical control." *Denominations* at 75. The merger was intended to institute no theological changes

and, as the resultant constitution makes clear, church polity continues to respect local independence: "The autonomy of the local church is inherent and modifiable only by its own action. Nothing . . . shall destroy or limit the right of each local church to continue to operate *in the way customary to it.*" *Id.*, at 220 (emphasis in original).

Respondents in this action would have the courts interfere with and inevitably prevent this unfettered exercise of religious belief and organization. The principle of judicial deference to ecclesiastical authorities on issues of church polity avoids this unconstitutional result, and the decision of the lower court must be reversed for its grave violation of this fundamental principle.

POINT IV

The implications of the lower court's acceptance of Respondents' overbroad definition of an "unincorporated association."

Respondents argued below that Rule 17(b), Fed. R. Civ. P., permits suit against the UMC and purported to rely on California Code of Civil Procedure § 388(a) and California Corporation Code § 24000 in support of their contention that UMC is a jural entity which may be subject to civil suit. However, § 388(a) provides only that any "unincorporated association . . . may sue and be sued . . ." and does not address the threshold issue of defining an "unincorporated association"; § 24000 simply states that an unincorporated association is an "organization of two or more persons . . . ."* Respondents asserted, and the lower court ap-

* *See* p. 8, *supra.*

parently concluded, without citation of authority, that an unincorporated association "is simply a group whose members share a common purpose and a common name."

The record before the lower courts contains uncontradicted expert evidence establishing that the only "common purpose" conceivably shared by members of the UMC is their worship of God in the Methodist fashion, and that their religious denomination has never exhibited the kind of quasi-corporate organization or activity which is the hallmark of the trade unions and other associations which previously constituted the kind of entity considered an "unincorporated association." *See, e.g., Georgia* v. *National Democratic Party*, 447 F.2d 1271 (D.C. Cir. 1971); *Juneau Spruce Corp.* v. *I. L. & W. Union*, 119 Cal. App. 2d 144, 259 P.2d 23 (1953).

Furthermore, the open-ended criteria proposed to define an unincorporated association are so broad as to be all inclusive. Brief consideration of even the most general religious categories further demonstrates the defectiveness of this proposed definition.

A. The Christian Church

The definition proposed by the respondents and accepted below would be equally applicable to an association comprised of all Christians in the United States, for such association would be a group whose members share a common purpose (activities furthering Christianity) and a common name (the Christian Church). The possibility of just such an application of this dangerously overbroad definition of "unincorporated association" is supported by Casad, *The*

Establishment Clause and the Ecumenical Movement, 62 Mich. L. Rev. 419, 423 (1964): "In this country we have tended to consider the Christian religion as being necessarily embodied in a varying number of denominational churches, but there is nothing absolute about this system . . . It is just as appropriate—perhaps more so—to regard the Christian religion as being embodied in one universal 'church,' with each denomination being viewed as a subdivision of that larger body." In fact, a standard definition of the word "church" is "the whole body of Christian believers; Christendom." The Random House Dictionary of the English Language 265 (1973 ed.).

B. Other Religions

Mention must also be made of non-Christian religions. American Judaism is comprised of three divisions, in all of which the local congregation enjoys full independence: 1) Orthodox Judaism, whose organizations include the Union of Orthodox Jewish Congregations of America, the Union of Orthodox Rabbis of the United States and Canada, the Rabbinical Alliance of America and the Rabbinical Council of America, Inc.; 2) Conservative Judaism, including as national organizations the United Synagogue of America and the Rabbinical Assembly; and 3) Reform Judaism, with the Union of American Hebrew Congregations and the Central Conference of American Rabbis. *1978 Yearbook* at 63; *Denominations* at 127. More than 6,000,000 American Jews today participate in thousands of local synagogues, many of which are not affiliated with national organizations, and in all three branches there are numerous organizations involved in education, religion, politics and community affairs, cultural events, social welfare, and Zionist or pro-Israel activities. *See generally The American Jewish Yearbook 1977* (Fine and Himmelfarb, eds.) (published by the American Jewish Committee), *cited in 1978 Yearbook* at 64.

Islamic religions would also constitute "an unincorporated association" under the criteria suggested by the respondents and accepted below. Two million Moslems in the United States today share Islamic beliefs and practice the same rituals in a wide variety of societies, organizations and mosques. *1978 Yearbook* at 68. In fact, all other religions in this country whose members share the common name of their faith and common spiritual beliefs would be similarly within the overbroad sweep of the proposed definition, and are therefore threatened by the lower court's effective revision of the internal organizational principles of the UMC.

Conclusion

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari must be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

THOMAS A. SHAW, JR.
ROBERT R. ELLIOTT, III

BREED, ABBOTT & MORGAN
Citicorp Center
153 East 53rd Street
New York, New York 10022
(212) 888-0800
Attorneys for the National Council of Churches of Christ in the United States of America, amicus curiae

IN THE

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Petitioners,

v.

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Respondent,

and

CHARLES W. TRIGG, et al.,
Real Parties in Interest.

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THOMAS M. RAYSOR
ANTHONY C. MORELLA

RAYSOR, BARBOUR & MORELLA

Attorneys for Amicus Curiae
The Association of United Methodist Theological Schools

Office and P. O. Address
5530 Wisconsin Avenue
Washington, D. C. 20015
(301) 656-4447

PRESS OF BYRON S. ADAMS, INC., WASHINGTON, D.C.

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Pursuant to Rule 42 of the Rules of this Court, The Association of United Methodist Theological Schools ("The Association") hereby moves for leave to file a brief, a copy of which is annexed hereto, as *amicus curiae* in support of the Petition for Writ of Certiorari filed by Petitioners Paul W. Milhouse and Ewing T. Wayland, being those persons upon whom service of process was attempted on behalf of The United Methodist Church, a named defendant in the underlying case.

The nature of the interest of The Association in this case arises out of the interest of its component members. The Association is a voluntary unincorporated association composed of thirteen graduate schools of theology approved by the University Senate and by the Division of Ordained Ministry of The United Methodist Church for "affiliation" with The United Methodist Church. The member institutions of The Association are as follows: Boston University School of Theology, Boston, Massachusetts; Drew University, The Theological School, Madison, New Jersey; Duke University, The Divinity School, Durham, North Carolina; Emory University, Candler School of Theology, Atlanta, Georgia; Gammon Theological Seminary, Atlanta, Georgia; Garrett-Evangelical Theological Seminary, Evanston, Illinois; The Iliff School of Theology, Denver, Colorado; Methodist Theological School in Ohio, Delaware, Ohio; Perkins School of Theology, Southern Methodist University, Dallas, Texas; Saint Paul School of Theology Methodist, Kansas City, Missouri; School of Theology at Claremont, Claremont, California; United Theological Seminary, Dayton, Ohio; Wesley Theological Seminary, Washington, D. C. "Affiliation" is a requirement for eligibility for receiving donations from the General

Conference and from any of the Annual Conferences, or United Methodist general boards, foundations or other agencies. The chief executive officer of each institution represents the school in The Association. Eight of these institutions are independent corporate entities; the remaining five are parts of larger universities which are also independent corporate entities. The function of the schools is to provide graduate-professional training to students with a vocation to the Christian ministry.

The interest of The Association on behalf of its members is as follows: The schools receive financial support from members of the churches through annual and general conferences and other agencies of the denomination. In return the schools provide a resource for the training and education of ministers and for research and scholarship in areas of concern to the denomination in fulfilling its stated mission as an arm of Christ's church in the world. Failure to review and reverse the lower court decision will inhibit the religious training of ministers of the denomination through alteration of the denomination's style of life and operation; adversely affect the financial security of these institutions; and cause the drying up of sources of charitable giving both within and without the denomination which could result in the collapse of these institutions. This would all be accomplished not by direct claims against the institutions but by a judgment against the denominational name and flowing downward from that against the institutions.

The unprecedented attempt here to lump all United Methodist units together and treat their individual assets as association assets of some superordinate fictional entity called "The United Methodist

Church" poses a direct threat to the tradition of charitable giving to support worthy causes in general, and particularly to the sources of support necessary for the continuation of private education, including theological education, in the United States.

One impact of the decision below might be to transform and reorganize The United Methodist Church into a polity that ignores the more than 200 years of Methodist development and tradition. This would be contrary to the anticipation and goals of students presently enrolled in or contemplating enrollment in these theological schools preparing for the ministry. Although the connection between such students and the subject matter of the approximately $5 million securities fraud judgment against "The United Methodist Church" is less than tenuous, nevertheless this would have a serious and blighting effect on their careers. The fraud allegation as well as the substantial judgment to be entered by default is a threat to their commitment and idealism as well as that of the ten million persons who call themselves United Methodists.

The adverse impact presented by the decision below which includes a religious denomination under the term "unincorporated association" should be immediately rectified so as to prevent disastrous impact upon members, bodies and educational institutions such as The Association in continuing their work in the religious education field.

The Association believes that its interest will not adequately be presented by the parties since the decision below will adversely affect religious educational training, the financial security of these institutions and the charitable giving necessary for the operation

of the schools, and these aspects will not be directly addressed in the other briefs. The purpose of the brief for which leave to file is sought herein is to supplement the briefs previously filed on behalf of petitioners and other *amici curiae.*

The brief will address four principal points as follows: (1) the adverse effect of the lower court decision upon students being trained for the ministry in United Methodist theological schools, and the questions raised by the decision under the Establishment and Free Exercise clauses of the First Amendment; (2) the adverse effect of the lower court decision on the assets and property of United Methodist schools and other separate denominational insitutions, boards and the like, and the questions raised by the decision under the Due Process clause of the Fifth Amendment; (3) the immediate and disastrous effect that the failure to reverse would have upon charitable giving by local churches and others to theological schools affiliated with The United Methodist Church, thereby constricting the free exercise of religion by damaging the vital function of education of its ministers; and (4) the adverse effect of allowing the Default Order against the denomination to stand, as if it were an unincorporated association or other suable entity rather than only worshippers of similar Christian beliefs under a common name (this will contain brief comments only).

There is a related matter coming into this Court in a petition for Writ of Certiorari which has been filed in *Barr, et al.* v. *United Methodist Church, et al.,* Supreme Court of the United States, Docket No. 79-245. The essential issues raised in this petition are also raised in that case, and it is respectfully requested that the *Barr* matter be considered and consolidated with this case by this Court.

Counsel for petitioners have consented to this Motion pursuant to a letter which has been filed with the Clerk of the Court. The consent of counsel for respondents was requested but has not been forthcoming.

Respectfully submitted,

/s/ _____
THOMAS M. RAYSOR

/s/ _____
ANTHONY C. MORELLA

RAYSOR, BARBOUR & MORELLA
5530 Wisconsin Avenue
Washington, D. C. 20015
(301) 656-4447

Attorneys for The Association of United Methodist Theological Schools, moving for leave to file brief as *amicus curiae* in support of the petition for a writ of certiorari

To: Office of the Clerk
Supreme Court of the United States

All Counsel Listed on the Annexed Certificate of Service

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INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in the Motion of The Association of United Methodist Theological Schools For Leave To File Brief As *Amicus Curiae* In Support Of Petition For Writ of Certiorari, and will not be reproduced here.

STATEMENT OF THE CASE

The statement of the case contained in the Petition for Writ of Certiorari ("Petition") is adequate and complete and need not be duplicated at length here. Succinctly, the United States District Court for the Southern District of California on August 23, 1978, entered an Order denying Petitioners' motion to dismiss for lack of jurisdiction over the defendant The United Methodist Church. (Appendix B at A-5 of the Petition). In the Court's oral opinion (Transcript, Appendix C at A-9), the Court adopted the view that The United Methodist Church is suable as an unincorporated association, namely, a hierarchical, jural entity, without accepting the unanimous testimony of ecclesiastical experts to the contrary. The Court of Appeals for the Ninth Circuit thereafter denied mandamus to review and that denial is now before this Court. In September 1978 a default was entered, with request to set it aside being denied July 16, 1979, and the matter of requested judgment in excess of $4 million, including pre-judgment interest, on the basis of alleged common law fraud and securities law violations against the denomination of "The United Methodist Church" is calendared for October 30, 1979.

ARGUMENT

Point I

The Court should grant review in this case because the imposition by the Court below of a hierarchical structure on The United Methodist Church changes the denomination's historical connectional structure by judicial fiat and thereby raises important questions of first impression under the Establishment and Free Exercise clauses of the First Amendment. Students who choose to enter training for the ministry in

the United Methodist schools because of the style and method of life involved in the denomination will be disaffected if the nature of the denomination is changed in violation of their rights of free exercise of religion.

A. Background and Impact on Constitutional Guarantees

The issue of how the Church or a church should be organized has been one of the most divisive in the history of Christendom. The reason for this is that the nature of the organization is intimately bound up with the doctrinal question of the individual's relationship to God and what the church's intermediary role in that relationship should be. In England, where The United Methodist Church finds its origins, this issue was the subject of bitter contention for more than two hundred years following the Protestant Reformation. The central point of dispute was the role of the episcopacy as intermediary between the person and God. Among the consequences of this contention were the so-called Puritan revolution, the English civil war, and the so-called Glorious Revolution. The First Amendment to the Constitution and its free exercise and establishment clauses were among the fruits of this strife, and resulted from the hard-won lessons learned from it.

A Court is simply not free to roam around in the *Book of Discipline* as if it were the bylaws of a secular unincorporated association, construe the terms therein as if they were terms whose meaning is determined by the secular law, ignoring the historical context in which the religious association adopted its form of organization and rules of discipline. The connectional

organization of The United Methodist Church (the "denomination") is rooted in the foundation of the Church by John Wesley, a clergyman of the Church of England, in the mid-Eighteenth Century. From England, Methodism spread to Ireland and then to America. In the beginning, Wesley thought of his people not as constituting a church but simply as forming so many societies composed of people inspired by his sermons and desiring to adhere to the Methodist discipline, which offered active spiritual participation in contrast to the lifeless ritualism into which it seemed that the Church of England had lapsed. The preachers were not ordained, and the members were required to receive the Sacraments in the Church of England. The yearly meetings of people called Methodists are still held in various places (now about 73 places in the United States of America plus additional places in other countries) and called "annual conferences", which are still the fundamental bodies of the Church (United Methodist Constitution, Division Two, Section, I, Article IV; also Section VII, Article II). There is not now and never has been one national or international headquarters, central office, chief executive office or officer, or any controlling entity representing the entire United Methodist Church. Only the General Conference may speak for the denomination. That General Conference is a quadrennial meeting lasting about two weeks consisting of no less than 600 nor more than 1,000 delegates, one-half of whom are ministers and one-half of whom are laity. The General Conference is given legislative power over all matters distinctively connectional, but the powers are restricted and limited. Powers not specifically given to the General Conference are to reside in the annual conferences, individually and separately.

Methodist units are incorporated for specific functions and purposes, such as holding property for preaching and worship, or for the fulfillment of educational, charitable, service, or missionary functions and purposes. The General Conference is not now and never has been incorporated as a legal entity nor is it a continuing control body. Its membership changes substantially from general conference to general conference. To structure the denomination according to secular legal views rather than ecclesiastical ones would do violence to established church polity and to the denomination's self-understanding. The avoidance of incorporation is and has been historically a deliberate choice consistent with the nature of the connectional relationship. For the early American church, valid meetings were held in England as well as in America. The equal validity of these several meetings is of major significance, establishing a loose relationship or "connection" but maintaining the identity and independent authority of each "meeting" or "conference". The validity of these several yearly meetings or conferences shows that there is no central authority or unified body which is valid for the whole movement. This principle has remained true and effective from that day until now, and it is still valid and characteristic of United Methodism. The courts do not understand this.

As to the relationship of the theological schools to the denomination, the oldest standardizing body for higher education in the nation is the University Senate of The United Methodist Church. This body is recognized by the General Conference as the body to determine which educational institutions may claim affiliation with The United Methodist Church. Recognition of affiliation gives the institution the right

to seek financial support from United Methodists and from agencies of The United Methodist Church. "Affiliation" in United Methodism does not connote control, domination or ownership of the "affiliated" unit or institution. There is no financial responsibility or legal responsibility given to the institution on behalf of the denomination, or given to the denomination on behalf of the institution. The use of the name "United Methodist" does create a fellowship, an identity, a connection, a common purpose for worship and service. Individual church bodies, incorporated under law and functioning under their charters and according to stated purposes, do now and should continue to be held legally responsible under the law. There are thousands of those units in United Methodism but collectively they are not a single body called an "unincorporated association" or otherwise.

The history and practice of The United Methodist Church is not that of an existing overarching entity which has responsibility for any or all church units which bear the United Methodist name; each body, agency or organization, including those within this Association of United Methodist Theological Schools, bears its own responsibility.

There was nothing known as "The United Methodist Church" until 1968 when members of the denominations known as "The Methodist Church" and "The Evangelical United Brethren Church" merged to form "The United Methodist Church," at which time there were agreements made between the two groups to operate together under the common name. Historically, the composition of the denomination has been extremely fluid and it has and continues to function under various forms of the connectional church structure as above described.

Students who choose to enter training through the United Methodist schools do so in large part because of the style and method of life involved in the manner of operation of The United Methodist Church as well as its philosophy of a loose horizontal structure rather than a vertical one. If the nature of the denomination should be changed by judicial fiat to be a monolithic structure, this would alter their religious preference, desires and goals in violation of their First Amendment rights of free exercise of religion. Furthermore, a charge of fraud against a whole denomination not organized with an executive to defend and speak for it will have an immediate unfavorable, seriously damaging impact on members of the denomination and would-be ministers. The practical effect is a final one at this stage since to litigate the matter of standing over many years will mean that a whole theological school generation will be affected in the interim.

B. Constitutional Principles

This case raises what appears to be a question of first impression in this Court concerning the application of the establishment and free exercise clauses of the First Amendment. Heretofore, the inquiry concerning to what extent the civil courts are permitted to intrude into the area of religious doctrinal disputes has taken place in the context of intra-church disputes. *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94 (1952), where the dispute was between two Russian Orthodox factions over the right to the use and occupancy of church property in New York; *Presbyterian Church* v. *Mary Elizabeth Blue Hull Memorial Church*, 393 U.S. 440 (1969), involving a

property dispute occasioned by the withdrawal of local churches from a general church organization; *Maryland and Virginia Eldership v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970), involving a property dispute between a general church and secessionist congregations; *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 695 (1976), involving the removal and defrocking of a bishop and the reorganization of a diocese; and *Jones* v. *Wolf*, ____ U.S. ____, 99 S. Ct. 3020 (1979), involving a property dispute between two local church factions. In all of these cases, the courts have been presented with a situation where their task was to ratify a decision taken by a church group; that is, two solutions were presented to the court by church groups and the court was to choose one of them. By contrast, this case involves an attempt by outside, non-church plaintiffs, and by the lower court, to impose a reorganization from outside, or to impose their conception of the reality of the church organization upon the church. It is submitted that such an intrusion poses the threat of the most serious kind of state interference in church affairs since the Constitution was ratified, and it appears to The Association of United Methodist Theological Schools ("The Association") that to countenance it would constitute no less than the establishment of a church order by judicial fiat.

In the present posture of the case, certain high officials of United Methodist agencies have been told that they are agents of The United Methodist Church and as such must answer on its behalf. Under the Discipline of The United Methodist Church, however, they are forbidden to do this and as a plain matter of fact they cannot do this. "No person, no paper, no organization has the authority to speak for The United Methodist Church, this right having been re-

served exclusively to the General Conference under the Constitution." *The Book of Discipline of The United Methodist Church* (1976), ¶ 612(1). The United Methodist Church simply has never been and is not organized in a fashion that permits these officials to act for the denomination, to speak for it or to bind the members by their acts.

What seems to be happening here is that the lower court is straining so hard to employ the "neutral principles" approach mandated by the decisions of this Court in the intra-church property dispute cases cited above that it is ignoring the fundamental nature of the organization and governance of the denomination in accordance with its ecclesiastical doctrines. Ignoring the affidavits submitted by the petitioners in support of their contention that The United Methodist Church is a loose connection or federation of individuals and organizations, the lower court based its decision on its own reading of the United Methodist *Book of Discipline* (1976) (hereafter "the *Discipline*"). Moreover, it read the *Discipline* as if it were the bylaws of any secular voluntary association. It is ironic that this result should be reached, but it appears to The Association that this result is attributable to the lower court's attempt to adhere to the ruling of this Court in *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976).

In *Milivojevich*, this Court reversed the Supreme Court of Illinois, which had invalidated the removal and defrockment of a diocesan bishop by the Holy Assembly of Bishops and the Holy Synod of the Serbian Orthodox Church. The Supreme Court of Illinois grounded its decision on the finding that the bishop's removal and defrockment were not in accordance with the Serbian Orthodox Church's own prescribed procedures and penal code. This Court held that the First

Amendment as applied to the states by the Fourteeenth Amendment prohibits the making of such an inquiry by a civil court into the constitutional provision of church government. This Court stated:

> We will not delve into the various church constitutional provisions relevant to this conclusion, for that would repeat the error of the Illinois Supreme Court. It suffices to note that the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs. . . .

426 U.S. at 721.

And throughout this Court's opinion there are stern warnings against a civil court's allowing itself to make any inquiry into any aspect of intrachurch disputes that might involve their becoming "entangled in essentially religious controversies or interven[ing] on behalf of groups espousing particular doctrinal beliefs"; and that "religious controversies are not the proper subject of civil court inquiry." This Court further stated,

> Indeed, it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

426 U.S. at 715-16 (footnote omitted).

Having wrapped all matters of religious belief in an ecclesiastical shroud that is impenetrable to the civil courts, then, this Court left them to fall back on the "neutral principles" or "formal title" approach of

Presbyterian Church v. *Mary Elizabeth Blue Hull Church, Inc.*, 393 U.S. 440 (1969).

In *Hull*, the Court held that although the First Amendment severely circumscribes the role of the civil courts in resolving church property disputes, nevertheless "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." 393 U.S. 440 at 449. The Court suggested that religious organizations must structure relationships involving church property in such a way as to allow the civil courts to resolve disputes over such property without having to resolve ecclesiastical questions. 393 U.S. at 449. This Court reaffirmed this basic principle last term in *Jones* v. *Wolf*, ___ U.S. ___, 99 S. Ct. 3020, 3026 (1979).

The foregoing cases, as previously stated, concerned intra-church disputes; they did not involve the resolution of a conflict concerning the fundamental nature of the ecclesiastical polity involved, since that was not in dispute in those cases.

The problem is that the lower court in this case seems to have applied the principles of these cases to the question of how The United Methodist Church is organized. Earnestly striving to avoid trespassing in the forbidden field of ecclesiastical doctrine as it applied to the Methodist connection, the court has ignored the fact that how a church is organized is a matter of vital religious concern. Instead, the court has treated the issue as if the matter of church organization were no more than a matter of administrative convenience.

The free exercise of religion encompasses the freedom to organize a religious polity in accordance with the wishes of its members whether rational or not. *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 114-116 (1952). The people who call themselves members of The United Methodist Church have made their choice, and this choice bears no recognizable relationship to the fictitious entity created for them by the lower court in this case.

Point II

The assets and property of United Methodist schools and separate denominational institutions, boards and the like, should not be placed in jeopardy and subject to a broadside judgment against the loosely designated "The United Methodist Church" in violation of their Fifth Amendment rights not to be deprived of their property without due process of law.

A. Historical Background

The first properties used primarily for Methodist purposes by John Wesley were various meeting rooms. Subsequently, he became concerned about the ownership of these properties and consulted three lawyers in London who prepared a model property deed to be used by Wesley's followers. The deed provided for specific individual trustees who would permit Wesley and those he appointed to use the property for denominational purposes and after his death to permit the use of the property by "such persons as shall be appointed at the yearly Conference of the people called *Methodists*, in London, Bristol, Leeds, Manchester, or elsewhere . . ." The deed was printed in the

1763 minutes of the yearly Conference. The deed was enrolled in chancery under the hand and seal of Wesley, February 28, 1784. The earliest deeds to individual trustees for Methodist houses of worship in America were copied from the model deed used in England. The language of all the early deeds assumes a yearly meeting of Methodists but the meeting is not in one place only but in several places.

Property belonging to the denomination of United Methodists, whether real estate or personalty, has been primarily local. Local trustees are elected, according to the law of the church, to maintain that property and to see that it is used according to its designated purposes. Whenever property and/or monetary assets are set aside for use beyond the local churches, the property is designated for specified purposes and uses of annual, jurisdictional or general Conference Boards and other units, each of which is a jural entity. There is no overall title-holding unity called "The United Methodist Church" or by any other name. United Methodism maintains to this day a functional attitude toward property and funds. All property and funds of whatever kind are for the preaching of the gospel and the worship of God, and for the service of people and of the nation through charitable and service acts. Church property is to this day held in trust at the local and conference levels of mission consistent with the principles established in John Wesley's original "model deed."

B. Constitutional Principles

In the case at bar, the validity of that historic trust methodology is challenged. Funds voluntarily given

for these specific charitable, educational or service functions could be diverted, according to the claims of plaintiffs, and used contrary to their designated purposes. Such claims are contrary to the meaning of connectionalism in United Methodism, are contrary to the polity and structure of United Methodism, and would if allowed to stand constitute a major hindrance to the charitable, educational and service activities of the Church.

If the Court should find that being related to the church and bearing the United Methodist name opens a church-related institution to levy for legal judgment entered against the denomination as a whole and unrelated to the institution's own life and activity, a school established for religious purposes might be rendered bankrupt. Out of prudence, schools may well be forced to consider dropping their church relationships in order to protect their assets and property from invasion and diversion. Considering the need of the church to have institutions for the training of its clergy and leadership, this possibility is disastrous.

If claims are allowed to stand against a denomination, not only will the self-understanding and organizational structure of United Methodism be changed but the charitable and philanthropic service of all national church bodies in the nation will be threatened and potentially ended. But there is relief to claimants having valid claims because individual church bodies, incorporated under law and functioning under their charters, are now and should continue to be held legally responsible under the law. There are thousands of those units in United Methodism but collectively they are not a single body known as an "unincorporated association" or otherwise.

The assets and property of United Methodist schools and separate denominational institutions, boards, funds and the like should not be placed in jeopardy and made subject to a broadside claim through the medium of the loosely designated name of "The United Methodist Church" as this would be in violation of their Fifth Amendment rights not to be deprived of their property without due process of law. The points here raised apply with equal validity with respect to the numerous funds established by the annual and general conferences, such as the Ministerial Education Fund, the Black College Fund, the Temporary General Aid Fund and the like.

Point III

Failure to reverse will have an immediate and disastrous effect upon charitable giving by local churches and others to theological schools affiliated with The United Methodist Church, thereby constricting the free exercise of religion by damaging the vital function of education of its ministers.

The Association of United Methodist Theological Schools ("The Association") is composed of institutions which are approved by the University Senate and by the Division of Ordained Ministry of The United Methodist Church for "affiliation" with the denomination. The University Senate is an accrediting agency and the Division of Ordained Ministry is responsible for maintaining the educational standards of the United Methodist ordained ministry. "Affiliation" is a requirement for the receipt of financial support from the various agencies of the denomination. The schools get financial support from the denomination directly from the annual conferences and, in

addition, through the Ministerial Education Fund established by the 1968 General Conference in order to expand the financial support for recruitment and education and to equip the annual conferences to meet the increased demands on them in these areas. They receive an even greater share of their financial support from non-denomination sources. If the lower court decision is allowed to stand and assets of schools, boards, funds and the like are attachable, donations by Methodists and others to these church agencies, including the theological schools, will dry up, since no one will contribute to an organization which will be unable to use the money for the purposes intended and where there exists the threat that the funds donated will be diverted to pay claims against an unrelated organization.

Point IV

The Default Order against "The United Methodist Church" should not be allowed to stand because the denomination, consisting only of worshippers of similar Christian beliefs under a common name, is not an unincorporated association or a suable entity.

This point is well briefed in the Petition and in the Motion of the National Council of the Churches of Christ in the United States of America For Leave To Appear As *Amicus Curiae* In Support Of The Petition For Writ of Certiorari and Brief Conditionally Filed In Support Thereof. The arguments expressed therein are adopted herein but no purpose would be served by repeating them here.

There is no question in this case of the membership of the denomination attempting to shield itself behind the First Amendment from liability in the civil courts

for alleged wrongdoing. The separate United Methodist corporations and unincorporated associations are suable and can be held accountable. In fact, the Pacific and Southwest Annual Conference, the General Council on Finance and Administration and the Pacific Methodist Investment Fund (all corporations) are already defendants in the underlying case. However, this case involves an unprecedented attempt in addition by an outside group to define a non-hierarchical religious denomination as a hierarchical one for its own convenience, and in the process to inflict upon innocent individual and corporate members of the denomination the penalties of alleged wrongdoing in which they were not involved and could not properly have been involved under the ecclesiastical law of the denomination.

If immediate relief is not granted the theological schools and the denomination will suffer irreparable harm during *lis pendens* which might be a period of five years or more before the litigation is concluded. Adversely affected would be members of the denomination, students, schools, charitable donors, all the programs of social service, funds, agencies, boards, and other institutions of the Church. The impact on ten million Methodists, and other denominations, during this interim period before the issue is resolved would be catastrophic. Therefore the issue should now be resolved.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted by this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

THOMAS M. RAYSOR

ANTHONY C. MORELLA

RAYSOR, BARBOUR & MORELLA

5530 Wisconsin Avenue
Washington, D.C. 20015
(301) 656-4447

Attorneys for The Association
of United Methodist
Theological Schools,
amicus curiae